Supreme Court, U.S.
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In the Supreme Court of the United States

JIMMY IRVIN, Individually and on Behalf of His Minor Child, Adam Irvin; MELBA IRVIN, Individually and on Behalf of Her Minor Child, Adam Irvin,

Petitioners,

v.

HYDROCHEM INC.; HYDROCHEM INDUSTRIAL SERVICES, INC.; GEORGIA GULF CORPORATION; MASTER MAINTENANCE CORPORATION; MASTER MANAGEMENT CORPORATION; PAYNE & KELLER COMPANY, INC.; LOUISIANA INTRASTATE GAS CO., L.L.C.; L.I.G, LIQUIDS CO., L.L.C.; AMOCO PIPELINE CO.; AMOCO ENERGY TRADING CORPORATION; XL INSURANCE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. 201-08 (2002), confers federal removal jurisdiction in the following familiar circumstances:

- Plaintiffs, non-signatories to an arbitration agreement, bring a personal injury action against multiple tortfeasors in state court;
- Plaintiffs include in their lawsuit direct action claims against a tortfeasor's foreign insurers;
- The tortfeasor has a written agreement with its insurers to submit disputes to arbitration;
- The tortfeasor and its insurers' arbitration agreements are subject to the Convention;
- The direct action defendant's insurers seek federal removal on the strength of the Convention;
- Plaintiffs do not consent or otherwise acquiesce to arbitration; and
- All defendants do not consent to removal from state court to federal court.

2. Whether a trial court can ignore evidence attached to a Fed. R. Civ. P. 59(e) motion to reconsider a judgment where the evidence would arguably defeat summary judgment dismissal and the failure to produce such evidence cannot be fairly attributed to the litigants?

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, petitioners state that they are individuals whose names fully appear in the caption.

Abbreviations

Pet. App.
Appendix to the Petition for Writ of Certiorari

R.
Record on Appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
ABBREVIATIONS ii
TABLE OF AUTHORITIES .....
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS 2
STATEMENT 4

A. Facts Giving Rise to the Petitioners' Mustard Gas Tort Claims 4

B. The case is removed to federal court. 5

C. Proceedings in federal district court. 6

D. The Court of Appeals' Decision 9

1. The Rule 59(e) motion 9

2. The jurisdictional issue: Is there federal jurisdiction? 11

REASONS FOR GRANTING THE PETITION

I. THE CONDITIONS PRECEDENT FOR ARBITRATION ARE NOT PRESENT. 14

A. The Conditions Precedent for Arbitration: a Mutual Agreement to Arbitrate 14

B. The Convention Requires Mutuality of Contract. 16

C. Exceptions to the Agreement in Writing Requirement 16

1. Incorporation by reference; 17

2. Assumption 17

3. Agency 18

4. Veil-Piercing/Alter Ego 18

5. Estoppel 18

6. Third-Party Beneficiary 19

D. Removal requires consent of all defendants. 19

II. Manifest Injustice. 21

A. The customary rule that one who voluntarily chooses his attorney cannot avoid the consequences of the acts or omissions of his freely selected agent should not apply where there are large gaps where the litigant during critical times in the litigation was without counsel—"a situation permitted by the district court—during the period of time that assistance of counsel was most crucial"—and counsel was allowed to withdraw during this critical time without

any procedural safeguards and without inquiring of an unrepresented litigant if it was his desire to proceed at any time without representation. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Acosta v. Master Maintenance & Constr., Inc., 52 F.Supp.2d. 699 (M.D. La. 1999) 1, 6, 20, 21

EEOC v. Waffle House, Inc., 534 U.S. 279, 293-94, 151 L. Ed. 2d 755, 122 S. Ct. 754 (2002) 15, 17

First Options v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1244, 131 L. Ed. 2d 985 (1995) 15

Javitch v. First Union Securities, Inc., 315 F.3d 619, 629 (6th Cir. 2003) 17

Link v. Wabash R.R, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) 14, 23

Matter of Amoco Petroleum Additives Co., 964 F.2d 706 (7th Cir. 1992) 20

Sapic v. Gov't of Turkm., 345 F.3d 347, 353 (5th Cir. 2003), *reh'g denied, reh'g, en banc, denied*, (5th Cir.2003) 15, 17

Sedco, Inc. v. Petroleos Mexicanos Mexican Na"l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985) 16

Smith v. Ayer, 101 U.S. 320, 326, 25 L.Ed. 955 (1879) 23

Thomson-C.S.F., S.A. v. American Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995) 17

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). 14, 15

Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002) 15

Zimmerman v. Int'l Cos. & Consulting, Inc., 107 F.3d. 344 (5th Cir. 1997) 19

Statutes and Treaties

21 U.S.T. 2517 2

9 U.S.C. § 201 *et seq.* .....*passim*

9 U.S.C. 201-08 (2002) 2

28 U.S.C. § 1254(1) 1

La. Rev. Stat. § 22:655 5

Other Authorities

Annot., *Enforcement of Arbitration Agreement Contained in Construction Contract by or Against Nonsignatory*, 100 ALR5th 481 (2002) 17

Ballentine's Law Dictionary, 3rd Edition (1969) 19

Comment, Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House, 8 Harv. Negot. L. Rev. 289 (2003) 18

Holstein-Childress, *The Enforceability of Arbitral Clauses Contained in Marine Insurance Contracts Against Nonsignatory Direct Action Claimants*, 27 MAR. LAW. 205 (2002) 17

Grundmeyer, *Fifth Circuit Symposium 2000: Insurance*, 46 Loy. L. Rev. 31, 36 n.34 (2000) 21

Lamm & Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711, 720 (2003)....16, 17, 18

Rules

F.R.Civ.P. 59(e) 24

Fed. R. Civ. P. 59(e) 9

Treatises

Farnsworth Contracts Sec. 4.26, n.19 (2001)... 19

Moore's Federal Practice (2004) 20

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Jimmy Irvin, *et al.*, (the "Irvins"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a–27a) is reported at 367 F.3d 473. The opinions of the District Court for the Middle District of Louisiana (John V. Parker, J.) denying petitioners' motion to alter, amend, and reconsider judgment is set forth in Pet. App. 27a–30a; granting summary judgment is set forth at Pet. App. 32a–38a; and denying the motion to remand to state court is set forth in Pet. App. 38a–48a. The opinion of the district court in the related case of *Acosta v. Master Maintenance & Constr., Inc.*, is reported at 52 F. Supp. 2d 699 (M.D. La. 1999). Pet. App. 49a.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on April 20, 2004. Pet. App. 2a. A timely petition for rehearing was denied on May 17, 2004. Pet. App. 1a. This petition for writ of *certiorari* is filed within 90 days of the date on which the appellate court denied rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08 (2002),[1] [hereinafter the **Convention Act**] provides at 9 U.S.C. § 201–05:

> **Sec. 201**. Enforcement of Convention
>
> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.
>
> **Sec. 202**. Agreement or award falling under the Convention
>
> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United

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[1] 9 U.S.C. 201-08 (2002) implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention Act), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. § 201 note (2002).

States if it is incorporated or has its principal place of business in the United States.

Sec. 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Sec. 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Sec. 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not ap-

pear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter I of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

STATEMENT OF THE CASE

A. Facts Giving Rise to the Petitioners' Mustard Gas Tort Claims

Petitioners Jimmy Irvin, a worker, Melba Irvin, his spouse, and Adam, their minor son, along with a multitude of others, sued respondents, Georgia Gulf, *et al.*, ("Georgia Gulf Defendants") in state court. The Irvins alleged state tort law claims for negligence, gross negligence, and later amended their complaint to include an intentional tort arising from injuries "relating to the release of a mustard gas agent at the Georgia Gulf Corporation facility in Plaquemine, Louisiana, that occurred on or about September 25, 1996."[2] Suit was commenced in late 1996 and the Irvins became parties in 1997.[3] Well over 100 plaintiffs brought suit related to this mustard gas release.

In August 1997, Georgia Gulf's insurers, X.L. Insurance Company ("X.L.") and Primex, Ltd. ("Primex"), a Barbados corporation and a Bermuda corporation, "were named as defendants in this

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2 Court of appeals decision at Pet. App. 3a.

3 Pet. App. 3a–4a.

action pursuant to the Louisiana Direct Action Statute, La. Rev. Stat. § 22:655."[4]

B. The case is removed to federal court.

In March 1999, over two years after the case was commenced, X.L. and Primex moved to remove the case from state court to federal court, pursuant to the Convention Act, 9 U.S.C. § 201 *et seq.* X.L.'s and Primex's "notice of removal allege that the grounds for removal is a dispute over coverage between the foreign insurers and Georgia Gulf."[5] X.L. and Primex asserted "that their insurance policies require that all coverage issues between Georgia Gulf and themselves be resolved through arbitration outside the United States." *Id.*

X.L. and Primex further asserted they have a right to remove the entire case from state court and not just the insurance dispute issue, "because the arbitration clauses contained in their respective policies are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," and since the Irvins' "state court action is 'related to' this agreement [*i.e.* the insurance policies] [the state court action] is subject to removal" to federal court at any time before the trial.[6]

"The Irvins filed a motion to remand on April 5, 1999," on the basis that defendants waived re-

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4 *Id.*

5 Pet. App. 50a.

6 Pet. App. 51a.

moval, removal was not timely, removal was not made with the consent of all defendants, there was no arbitral issue between plaintiffs and defendants, and state court issues should have been severed and remanded. The district court in its ruling denying the motion to remand explicitly adopted its ruling and findings in the related *Acosta* case.[7]

The district court then found it had original jurisdiction over the entirety of any action falling under the Convention Act, that defendants did not expressly waive removal, that removal of the action from state court was timely, that there was an arbitral issue, and that removal was not contingent on consent of all defendants.[8]

C. Proceedings in federal district court.

The Irvins had no fewer than four separate sets of attorneys that represented them in federal district court before the district court entered summary judgment against them. The record is unclear as to why the Irvins' attorneys withdrew. The record does show that when the district court permitted the Irvins' third set of attorneys to withdraw on March 14, 2002, the Irvins were without legal representation for five months during a critical period in this litigation.

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7 Pet. App. 40a referring to *Acosta v. Master Maintenance & Constr., Inc.*, 52 F. Supp. 2d 699 (M.D. La. 1999) set forth at Pet. App. 49a.

8 Pet. App. 38a-48a.

On March 1, 2002, a pretrial Order was entered setting forth pretrial deadlines. This Order was entered at the request of the Irvins' attorneys, Bensabat and Edwards. The March 1, 2002, Order directed the Irvins to: 1) produce all medical reports by March 15, 2002—**one day** before the third set of attorneys were permitted to decamp; 2) list all treating physicians and identify all experts by July 1, 2002; and 3) submit all expert reports by August 1, 2002. Remarkably, Bensabat and Edwards were permitted to withdraw without the court making certain, let alone inquiring, whether the Irwins engaged new counsel or whether they desired to proceed *pro se*.

"In short, the Irvins were completely without counsel—a situation permitted by the district court—during the period of time that assistance of counsel was most crucial to the Irvins' case."[9] It was during this five month legal representation gap that each of the cutoffs and deadlines contained in the March 1, 2002, Order fell.

The Irvins were unaware of the deadlines; they did not have knowledge of Georgia Gulf's motion seeking summary dismissal of their case and they were clueless that their case could be dismissed.[10] In these circumstances, it is unremarkable that the "Irvins failed to meet each of these court-imposed deadlines."[11]

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9 Pet. App. 23a.

10 R. 615.

11 Pet. App. 28a.

On August 22, 2002, attorney George Tucker enrolled as counsel for the Irvins.[12] The trial judge held a status conference on August 27, 2002, which Tucker attended.[13]

On August 30, 2002, the Georgia Gulf Defendants filed a motion for summary judgment and/or dismissal, asserting that the Irvins had failed to satisfy the elements of their claim. The Irvins filed no opposition to the Defendants' motion for summary judgment.

On October 30, 2002, the district court issued its ruling granting the Defendants' motion for summary judgment. The district court stated:[14]

> In this case, plaintiffs have alleged that they suffered harm by exposure to the mustard gas release but have failed to produce any evidence whatsoever of such injury. In a toxic tort case such as this . . . medical evidence is essential to establish harm to plaintiffs. Without having produced any medical evidence, plaintiffs cannot establish that they suffered damages, an essential element of their case.

Subsequently, on November 5, 2002, George Tucker, the Irvins' counsel, filed a motion to withdraw from the case. The district court granted the withdrawal on November 20, 2002, and entered

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[12] R. 510.

[13] R. 516.

[14] Pet. App. 6a; 37a.

judgment dismissing the Irvins' case the following day.

On December 6, 2002, the Irvins obtained new counsel, who immediately filed a Fed. R. Civ. P. 59(e) motion to alter, amend, and reconsider the judgment. Specifically, the Irvins requested that the district court reconsider and vacate the November 21, 2002, judgment to prevent manifest injustice.

Plaintiffs' Rule 59 motion contended that ample evidence exists showing that Mr. Irvin's exposure to mustard gas at the Georgia Gulf facility caused him to suffer serious diagnosed and documented physical, mental, and emotional damages. Plaintiffs attached to their motion treating physician reports which were produced during discovery, as well as an affidavit from Mr. Irvin.[15] Plaintiffs' motion contended that this evidence linked Mr. Irvin's exposure to his physical and psychological problems. The district court did not consider this evidence and denied the motion.

D. The Court of Appeals' Decision

1. The Rule 59(e) motion.

A divided panel of the court of appeals affirmed finding "that the facts in this case do not warrant the extraordinary relief associated with the granting of a motion for reconsideration. Therefore, the district court did not abuse its discretion in deny-

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[15] Pet. App. 19a.

ing the Irvins' Rule 59(e) motion."[16] Simply put, the failure of the Irvins to respond to defendants' summary judgment papers was fatal.

Judge Dennis in his dissent found that "the district court has presided over many other cases involving this same chemical spill. In exercising its discretion ... the district court should have also considered the likelihood, based on its experience in these other cases, that plaintiff's additional evidence was relevant to the merits of the summary judgment motion."[17] Judge Dennis believed it "was a misuse of judicial discretion" not to consider the medical and causation evidence submitted with the Irvins' Rule 59(e) motion,[18] since

> First the plaintiffs did not present the evidence to the district court initially, through no fault of their own, but because they were subjected to attorney conduct and inaction so egregious that it "amounted to nothing short of leaving [them] unrepresented." While it is true that a district court has the discretion to refuse to use Rule 59 to "rescue" a plaintiff from simple negligence, or a "blunder" by his attorney, the facts of this case go far beyond a simple blunder by a plaintiff's attorney. The conduct of the Irvins' attorneys

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16 Pet. App. 14a.

17 Pet. App. 26a, n24.

18 Pet. App. 20a.

in this case constitutes "neglect so gross that it is inexcusable."[19]

* * *

Second, the omitted evidence was critical to the Irvin's case because the evidence, had the court accepted it, arguably creates a dispute of material fact that would have allowed the Irvins to defeat summary judgment....[20]

Finally, the defendants would not be prejudiced by the admission of this evidence because the plaintiffs provided defendants with the relevant information in September of 2000, almost two years before defendants filed their summary judgment motion.

In short, proper application of the factors that this court has instructed district courts to use in deciding whether to consider additional evidence submitted with a Rule 59 motion should have led the district court to consider the evidence.[21]

2. The jurisdictional issue: Is there federal jurisdiction?

The Irvins did not raise in its notice of appeal any jurisdictional issue. At oral argument, the court of appeals *sua sponte* inquired whether any

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19 Pet. App. 22a [internal notes omitted].

20 Pet. App. 25a.

21 Pet. App. 26a.

appellate level precedent in the fifth circuit supported subject matter jurisdiction in this case. More specifically, the court inquired whether the Convention Act supported jurisdiction.. After demanding full briefing, the Georgia Gulf Defendants filed a supplemental brief on this issue, as did the Irvins. Their directive notwithstanding, the court of appeals refused to reach the jurisdictional issue, stating: "In their notice of appeal, the Irvins do not raise any issue as to the propriety of the initial removal of this case from state court nor as to the propriety of the denial of their motion to remand to state court; and we accordingly have not addressed these issues on appeal."[22]

REASONS FOR GRANTING THE WRIT

This case presents a technical and recurring jurisdictional issue: whether the Convention Act confers federal removal jurisdiction in the following familiar circumstances:

- Plaintiffs, non-signatories to an arbitration agreement, bring a personal injury action against multiple tortfeasors;
- Plaintiffs include in their lawsuit direct action claims against a tortfeasor's foreign insurers;
- The tortfeasor has a written agreement with its insurers to submit disputes to arbitration;

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22 Pet. App. 7a n.1.

- The tortfeasor and its insurers' arbitration agreements are subject to the Convention Act;
- The direct action against defendant's insurers seek federal removal on the strength of the Convention;
- Plaintiffs do not consent or otherwise acquiesce to arbitration; and
- All defendants do not consent to removal from state court to federal court.

This is a question of first impression in this Court, which raises important issues both about the efficient functioning of the district courts and about the proper relation between courts of the States and courts of the United States.

The second question presented involves the proper standard to be applied in determining whether a district court abuses its discretion in refusing to consider material presented in the context of a timely Rule 59(e) to amend, alter, or reconsider a judgment on the basis of manifest injustice where it is clear that trial deadlines were ignored while the litigants were without counsel. These deadline violations were compounded here by enrollment of new counsel. After the deadlines were long past, new counsel made no attempt to respond to a summary judgment motion—even though the Plaintiffs had produced evidence during discovery which may have, in the words of the

dissenting judge, "arguably create[d] a dispute of material fact ... to defeat summary judgment."[23]

The second question asks the Court to revisit the jurisprudential rule of *Link v. Wabash R. Co.*: in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent,[24]" where, as is the case here, the litigants are blameless and the court has inadvertently contributed to the virtual abandonment of the litigants case at a critical times in the litigation.

I. THE CONDITIONS PRECEDENT FOR ARBITRATION ARE NOT PRESENT.

A. The Conditions Precedent for Arbitration: A Mutual Agreement to Arbitrate

It is a familiar principle that the right and duty to arbitrate disputes is purely a matter of contractual agreement between the parties.[25] Accordingly, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[26] The threshold inquiry is whether the parties have agreed to arbitrate.

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23 Pet. App. 26a.

24 370 U.S. 626, 634, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962).

25 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-18, 92 S. Ct. 1907, 1916-18, 32 L. Ed. 2d 513 (1972

26 *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

This Court has consistently held that unless there is "clear and unmistakable" evidence that the parties have consented to arbitration, the courts should not assume that the cause is arbitral.[27] This Court has further instructed, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[28]

Accordingly, "[i]n order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause."[29] Arbitration agreements "must be in writing and signed by the parties" and may apply to nonsignatories only "in rare circumstances."[30] This Court has made clear that arbitration is a matter of private contract, and "it goes without saying that a contract cannot bind a nonparty."[31] The Irvins have no written agreement to arbitrate with any party to this litigation.

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[27] *First Options v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1244, 131 L. Ed. 2d 985 (1995).

[28] *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

[29] *Sapic v. Gov't of Turkm.*, 345 F.3d 347, 353 (5th Cir. 2003), *reh'g denied, reh'g, en banc, denied*, (5th Cir.2003)

[30] *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002).

[31] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94, 151 L. Ed. 2d 755, 122 S. Ct. 754 (2002).

B. The Convention requires mutuality of contract.

The Convention Act does not alter the above analysis. The Convention Act requires that a court find the following for arbitration to hold: "(1) an agreement in writing to arbitrate the dispute (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen."[32] The Convention itself makes mutuality of contract a condition precedent. The Convention requires that an "agreement in writing" to arbitrate must be signed by the parties or otherwise contained in an exchange of letters or telegrams.[33]

C. Exceptions to the Agreement in Writing Requirement

The courts have developed six theories, for binding a non–signatory to an arbitration agreement: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e)

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[32] *Sedco, Inc. v. Petroleos Mexicanos Mexican Na"l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985).

[33] The Convention at Article II, 2. 31U.S.T. 2517. Lamm & Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711, 720 (2003).

estoppel; and (f) third-party beneficiary.[34] None of these exceptions apply to the Irvins.

1. Incorporation by reference;

Incorporation by reference is a contract drafting technique where an extraneous writing becomes a part of a written contract by reference thereto.[35] This theory is not applicable here.

2. Assumption

"In the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate."[36] Since the Irvins did not initiate

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[34] *Sapic v. Gov't of Turkm.*, 345 F.3d 347, 353 (5th Cir. 2003); *See also Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 532 (5th Cir. 2000) (Dennis, J., dissenting). *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 629 (6th Cir. 2003). Holstein-Childress, *The Enforceability of Arbitral Clauses Contained in Marine Insurance Contracts Against Nonsignatory Direct Action Claimants*, 27 MAR. LAW. 205 (2002). Comment. *Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House*, 8 Harv. Negot. L. Rev. 289 (2003); Annot., *Enforcement of Arbitration Agreement Contained in Construction Contract by or Against Nonsignatory*, 100 ALR5th 481 (2002); Lamm & Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711 (2003).

[35] *See generally* Ballentine's Law Dictionary, 3rd Edition (1969); Farnsworth Contracts Sec. 4.26, n.19 (2001).

[36] *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995).

or advantage themselves of arbitration, this theory is not apposite.

3. Agency

"Traditional principles of agency law may bind a nonsignatory to an arbitration agreement."[37] There is no agency present here.

4. Veil-Piercing/Alter Ego

The Irvins have no connection with any corporation or other incorporeal being to apply this doctrine.

5. Estoppel

This non-signatory theory has been aptly condensed:[38]

> Courts may estop a non-signatory from refusing to comply with an arbitration clause "when it receives a 'direct benefit' from a contract containing an arbitration clause." Under this pure equity analysis, if a non-signatory receives notice of an arbitration clause contained in an agreement that intentionally and directly benefits her, and she fails to object to the agreement, she may be bound by its terms. This policy exists because "allowing [a plaintiff] to claim the benefit of the contract and si-

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[37] *Id.*

[38] Lamm & Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711, 727 (2003).

multaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."

There is no estoppel to apply here.

6. Third-Party Beneficiary

Louisiana's direct action statute,[39] allowing a personal injury claimant to sue directly the tortfeasor's insurer, does not make the personal injury claimant a third–party beneficiary of the policy. It was observed in *Zimmerman v. Int'l Cos. & Consulting, Inc.*, "the FAA, the source of the federal policy favoring arbitration, has no application to require a direct action plaintiff to arbitrate or to stay their lawsuits during arbitration."[40] *Zimmerman* further held that direct action plaintiffs are not third-party beneficiaries of the insurance policy bound by the arbitration clause.[41] The analysis under the Convention Act is no different.

D. Removal requires consent of all defendants.

Section 205 of the Convention Act provides that "the defendant or the defendants" may remove the action to federal court. This phrase is identical to the language of the general removal statute, 28 U.S.C. 1441(a), which has been held to require

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39 La. R.S. 22:655.

40 107 F.3d 344, 346 (5th Cir. 1997).

41 Id.; Grundmeyer, *Fifth Circuit Symposium 2000: Insurance*, 46 Loy. L. Rev. 31, 36 n.34 (2000).

that all defendants join in the removal.[42] Here, all defendants did not join in the removal. The district court nevertheless found

> [a]fter considering both the policies underlying the Convention and its removal statute and without restating all of the reasoning of **Acosta**, this court concluded that to require consent of all defendants would defeat the legislative purpose of §205 and the broad construction given to it under prior case law.... The consent of all non-removing defendants is not required under the statutes implementing the Convention.[43]

This holding acquiesced to by the court of appeals is in variance with other courts and expands without warrant the boundaries of the Convention Act. *See, e.g., Matter of Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992) (denying a writ of mandamus as to a district court order of remand based on the failure of all defendants to join in the removal under the Convention Act § 205).

Moreover, the *Acosta* reasoning employed in the case *sub judice* cannot be squared with the clear language of § 205, that "**[t]he procedure for removal of causes otherwise provided by law shall apply,**" which means that the general removal rule of section 1441(a) that all defendants must join in

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42 MOORE'S FEDERAL PRACTICE ¶107.11.

43 Pet. App. 41a-42a.

the notice of removal also applies to removals under section 205.

The interpretation of the Act in the *Acosta* manner would permit removal to federal court for every third-party agreement containing an arbitration clause even if no defendant joined the removing defendant. A fender–bender involving several cars would be subject to federal jurisdiction at the whim of a foreign insurance company that insured one defendant driver or the foreign insurer's insured! Indeed, any automobile owner could defeat state court jurisdiction at his discretion by having a foreign insurer with an arbitration agreement. This result would have the unanticipated consequence of conferring a business advantage to an offshore insurer over a domestic insurer.

II. Manifest Injustice.

Under the terms of F.R.Civ.P. 59(e), a court may grant a motion to alter or amend a judgment in any of the following circumstances:

- to take account of an intervening change in controlling law;
- to take account of newly discovered evidence;
- to correct clear legal error; or
- to prevent manifest injustice.

The court of appeals in its decision accurately stated that "the Irvins requested that the district court reconsider and vacate the November 21, 2002, judgment to prevent **manifest injus-**

tice."[44] The court then conflates manifest injustice with manifest error of law and fact.[45] While there may not be a **manifest error of law or fact** present here, there is a **manifest injustice**.

> **A. The customary rule that one who voluntarily chooses his attorney cannot avoid the consequences of the acts or omissions of his freely selected agent should not apply where there are large gaps where the litigant during critical times in the litigation was without counsel—"a situation permitted by the district court—during the period of time that assistance of counsel was most crucial"[46]—and counsel was allowed to withdraw during this critical time without any procedural safeguards and without inquiring of an unrepresented litigant if it was his desire to proceed at any time without representation.**

The district court countenanced a revolving door of representation that left critical gaps in the Irvins' legal representation. The attorney withdrawal tolerated by the district court inadvertently, but surely, aided the "complete abandonment by the legal system"[47] here depriving the Irvins of a

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44 Pet. App. 6a.

45 Pet. App. 12a-14a.

46 Pet. App. 23a.

47 Pet. App. 26a.

decision on the merits, thereby wreaking a manifest injustice upon a seriously injured litigant. The time-honored *Link v. Wabash R.R.*, aphorism that one who "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer–agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney,"[48] should not apply where the litigant is blameless and the court is complicit in the problem.

On the facts of this case, the easy answer is also the one that results in manifest injustice. What is evident here is not a mere attorney blunder. It is as found by the dissent, "egregious lawyer misconduct" causing the Irvins a "deprivation of representation and the benefits of the adversary system of justice." While a litigant may bear responsibility in an ordinary case, in the circumstances here the court that set the pretrial scheduling and allowed a revolving door of representation without any input from the client also bears responsibility and incumbent upon the court to correct the manifest injustice. In these circumstances, it is an abuse of the trial court's discre-

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[48] 370 U.S. 626, 634, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962) quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1879).

tion not to view the evidence accompanying the Rule 59(e) motion and Rule 59(e) relief is indicated.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of *certiorari* be granted.

Respectfully submitted.

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Supreme Court, U.S.
FILED
04 237 AUG 16 2004
OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

JIMMY IRVIN, Individually and on Behalf of His Minor Child, Adam Irvin; MELBA IRVIN, Individually and on Behalf of Her Minor Child, Adam Irvin,

Petitioners,

v.

HYDROCHEM INC.; HYDROCHEM INDUSTRIAL SERVICES, INC.; GEORGIA GULF CORPORATION; MASTER MAINTENANCE CORPORATION; MASTER MANAGEMENT CORPORATION; PAYNE & KELLER COMPANY, INC.; LOUISIANA INTRASTATE GAS CO., L.L.C.; L.I.G, LIQUIDS CO., L.L.C.; AMOCO PIPELINE CO.; AMOCO ENERGY TRADING CORPORATION; XL INSURANCE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDICES

A. United States Court of Appeals
Denial of Rehearing
(May 17, 2004) 1a

B. Opinion of United States Court of Appeals
for the Fifth Circuit
(April 20, 2004) 2a

C. District Court Ruling on Motion to Alter,
Amend and Reconsider Judgment
(February 4, 2003) 27a

D. Judgment of the District Court
(November 21, 2002) 31a

E. Ruling on Motion for
Summary Judgment or Dismissal
(October 30, 2002) 32a

F. District Court Ruling on Motions
(to remand to state court)
(June 9, 1999)..... 38a

G. District Remand Ruling in the related case
of *Acosta v. Master Maintenance & Constr., Inc.*, 52 F. Supp. 2d 699 (M.D. La. 1999)
(March 2, 1999) 49a

Appendix A

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 03-30250

LUCIEN TEMPLET, JR.; ET AL.,

Plaintiffs,

MELBA IRVIN, Individually and on Behalf of Her Minor Child, Adam Irvin; JIMMY IRVIN, Individually and on Behalf of His Minor Child, Adam Irvin

Plaintiffs-Appellants,

VERSUS

HYDROCHEM INC.; ET AL.,

Defendants,

HYDROCHEM INC.; HYDROCHEM INDUSTRIAL SERVICES INC.; GEORGIA GULF CORPORATION; MASTER MAINTENANCE CORPORATION; MASTER MANAGEMENT CORPORATION; PAYNE & KELLER COMPANY INC.; LOUISIANA INTRASTATE GAS CO. LLC; LA INTRASTATE GAS CORP.; AMOCO PIPELINE CO.; AMOCO ENERGY TRADING CORPORATION; XL INSURANCE CO.,

Defendants-Appellees.

[Filed May 17, 2004]

On Appeal from the United States District Court
for the Middle District of Louisiana

Before DeMOSS, DENNIS, and PRADO, Circuit Judges.

Per Curiam:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/ signature illegible /
United States Circuit Judge

Appendix B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 03-30250

LUCIEN TEMPLET, JR.; ET AL.,

Plaintiffs,

MELBA IRVIN, Individually and on Behalf of Her Minor Child, Adam Irvin; JIMMY IRVIN, Individually and on Behalf of His Minor Child, Adam Irvin

Plaintiffs-Appellants,

VERSUS

HYDROCHEM INC.; ET AL.,

Defendants,

HYDROCHEM INC.; HYDROCHEM INDUSTRIAL SERVICES INC.; GEORGIA GULF CORPORATION;

MASTER MAINTENANCE CORPORATION; MASTER MANAGEMENT CORPORATION; PAYNE & KELLER COMPANY INC.; LOUISIANA INTRASTATE GAS CO. LLC; LA INTRASTATE GAS CORP.; AMOCO PIPELINE CO.; AMOCO ENERGY TRADING CORPORATION; XL INSURANCE CO.,

Defendants-Appellees.

[April 20, 2004, Filed] Revised May 6, 2004

On Appeal from the United States District Court for the Middle District of Louisiana

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Before DeMOSS, DENNIS, and PRADO, Circuit Judges.

DeMOSS, Circuit Judge.

Plaintiffs-Appellants, Melba Irvin, *et al.* (the "Irvins"), appeal the granting of summary judgment by the district court for Defendants-Appellees, and the subsequent denial of the Irvins' Rule 59*(e)* motion to alter, amend, and reconsider in a toxic tort action arising from a chemical release from Defendants' facility.

BACKGROUND AND PROCEDURAL HISTORY

This case arises out of claims brought in state court relating to the release of a mustard gas agent at the Georgia Gulf Corporation facility in Plaquemine, Louisiana, that occurred on or about September 25, 1996. On November 8, 1996, suit was filed in state district court, asserting claims against multiple defendants, including Georgia

Gulf Corporation, X.L. Insurance Company, Primex, Ltd., HydroChem Industrial Services, Inc., Payne & Keller Company, Inc., Master Maintenance & Construction, Inc., Amoco Energy Trading Corporation, Louisiana Intrastate Gas Company, L.L.C., and LIG Liquids Company, L.L.C. (collectively, the "Defendants").

On March 5, 1999, X.L. Insurance Company and Primex, Ltd. removed the case to federal court, asserting jurisdiction under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards pursuant to 9 U.S.C. § 201 *et seq.* X.L. Insurance Company and Primex, Ltd. are foreign insurance companies who were named as defendants in this action pursuant to the Louisiana Direct Action Statute, La. Rev. Stat. § 22:655. The Irvins filed a motion to remand on April 5, 1999, that was denied by the district court on June 9, 1999.

The Irvins, who were added as additional plaintiffs to the original state court proceeding in March and September 1997, maintain that they sustained injuries as a direct and proximate result of the negligence of the Defendants. Since joining as plaintiffs, the Irvins have been represented by four separate sets of attorneys. On January 7, 2002, the Irvins' second set of counsel, Albert Bensabat and Daniel Edwards, filed a motion to establish discovery cutoff and trial dates and/or a status conference. On March 1, 2002, the magistrate held a status conference where she set discovery deadlines, ordering the Irvins to: 1) provide the Defendants with all medical reports by March 15, 2002; 2) list all treating physicians and

identify all experts by July 1, 2002; and 3) submit all expert reports by August 1, 2002. On March 14, 2002, one day before the Irvins were ordered to provide the Defendants all medical reports, Bensabat and Edwards filed a motion to withdraw as counsel for the Irvins. The following day the magistrate granted the motion to withdraw. Thereafter, the Irvins failed to identify any experts or produce any medical or expert reports in compliance with the court's deadlines.

On August 22, 2002, George Tucker enrolled as counsel for the Irvins. The district court held a status conference on August 27, 2002, that was attended by Mr. Tucker, appearing on behalf of the Irvins. The district court judge entered an order the following day referring the matter to the magistrate for entry of scheduling orders and trial preparation "anticipating a trial date in March or April 2003." On August 30, 2002, the Defendants filed a motion for summary judgment and/or dismissal, asserting that the Irvins had failed to satisfy the elements of their claim. Specifically, the Defendants maintained that the Irvins could not, through the requisite expert evidence, establish negligence on the part of the Defendants, nor could they establish causation and damages. In the alternative, the Defendants sought the dismissal of the Irvins' claims for their failure to adhere to the court-ordered deadlines. The Irvins did not file any opposition to the Defendants' motion for summary judgment.

On October 30, 2002, the district court issued its ruling granting the Defendants' motion for summary judgment. The district court stated:

> In this case, plaintiffs have alleged that they suffered harm by exposure to the mustard gas release but have failed to produce any evidence whatsoever of such injury. In a toxic tort case such as this . . . medical evidence is essential to establish harm to plaintiffs. Without having produced any medical evidence, plaintiffs cannot establish that they suffered damages, an essential element of their case.

Subsequently, on November 5, 2002, George Tucker, the Irvins' counsel, filed a motion to withdraw from the case. The district court granted the withdrawal on November 20, 2002, and entered judgment dismissing the Irvins' case the following day.

On December 6, 2002, the Irvins obtained new counsel, who immediately filed a Fed. R. Civ. P. 59(e) motion to alter, amend, and reconsider the judgment. Specifically, the Irvins requested that the district court reconsider and vacate the November 21, 2002, judgment to prevent manifest injustice. On February 4, 2003, the district court denied the Rule 59(e) motion, stating that the motion for summary judgment was filed while the Irvins were represented by counsel, who neither requested a continuance nor sought a rescheduling of deadlines. The Irvins filed a timely notice of appeal on March 3, 2003.

JURISDICTION

This suit was originally filed in Louisiana state district court on November 8, 1996. On March 5,

1999, two of the multiple defendants, X.L. Insurance Company and Primex, Ltd., removed the case to federal district court pursuant to 28 U.S.C. § 1446(d), asserting jurisdiction under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* The Irvins subsequently filed a motion to remand, which was denied by the district court. The Defendants' motion for summary judgment was granted, and the district court entered judgment on November 21, 2002. The Irvins filed a timely Rule 59(e) motion, which was denied by the district court on February 4, 2003. The Irvins then filed their notice of appeal on March 3, 2003.[1] This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291.

STANDARD OF REVIEW

I. The Irvins' Rule 59(e) Motion to Reconsider

The applicable standard of review of the denial of the Irvins' motion to alter, amend, and reconsider is dependent on whether the district court considered the materials attached to the Irvins' motion, which were not previously provided to the court.[2] *Ford Motor Credit Co. v. Bright,* 34 F.3d

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[1] In their notice of appeal, the Irvins do not raise any issue as to the propriety of the initial removal of this case from state court nor as to the propriety of the denial of their motion to remand to state court; and we accordingly have not addressed these issues on appeal.

[2] According to the Irvins' briefs, the additional materials included reports showing that Mr. Irvin "suffered physical and psychological injuries as a direct and proximate result of his exposure to [sic] mustard gas release at the Georgia Gulf plant."

322, 324 (5th Cir. 1994). If the materials were considered by the district court, and the district court still grants summary judgment, the appropriate appellate standard of review is *de novo*. *Id.* However, if the district court refuses to consider the materials, the reviewing court applies the abuse of discretion standard. *Id.* Under this standard of review, the district court's decision and decision–making process need only be reasonable. *Id.*

Based on a review of the district court's ruling on the motion for reconsideration, it is unclear whether the additional materials submitted by the Irvins were considered by the district court. The district court does not expressly or impliedly refer to the additional materials in its ruling. Therefore, in the absence of any specific reference to these materials, we review the district court's denial of the Irvins' Rule 59(e) motion for abuse of discretion, *i.e.*, as if the district court did not consider the additional materials.

II. Defendants' Motion for Summary Judgment

This Court reviews grants of summary judgment *de novo*, applying the same standard as the district court. *Tango Transp. v. Healthcare Fin. Servs. LLC*, 322 F.3d 888, 890 (5th Cir. 2003). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The Court views the evidence in a light most favorable to the non-movant. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). The non- movant must go beyond

the pleadings and come forward with specific facts indicating a genuine issue for trial to avoid summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is appropriate, however, if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex,* 477 U.S. at 322-23.

DISCUSSION

I. Whether the district court abused its discretion in denying the Irvins' motion to alter, amend, and reconsider its ruling granting the Defendants' motion for summary judgment.

The Irvins suggest that the proper method for evaluating a motion for reconsideration of a summary judgment where the movant submits evidentiary materials in support of its motion that were not considered by the court in its summary judgment ruling involves the consideration of the factors enumerated in *Lavespere v. Niagara Machine & Tool Works, Inc.,* 910 F.2d 167 (5th Cir. 1990), overruled on other grounds, *Little v. Liquid Air Corp.,* 37 F.3d 1069 (5th Cir. 1994). The *Lavespere* factors include: 1) the reasons for the moving party's default; 2) the importance of the omitted evidence to the moving party's case; 3) whether the evidence was available to the non-

movant before it responded to the summary judgment motion; and 4) the likelihood that the non-moving party will suffer unfair prejudice if the case is reopened. *Id.* at 174.

Taking these factors in turn, the Irvins argue that their failure to provide the court with the requisite medical reports, lists of treating physicians and all other experts, as well as the Irvins' medical expert reports was a direct result of the lapse in legal representation that occurred between March 15, 2002, and August 22, 2002. The Irvins contend that the withdrawal by Bensabat and Edwards on March 14, 2002, constituted "client abandonment." In response, Defendants simply argue that any delays in submitting additional materials to the court "begin and end with the Irvins."

Second, the Irvins claim that the additional materials included in their motion for reconsideration are critical to their case. Specifically, they argue that the materials include medical evidence linking their "ongoing physical and psychological sufferings" to the exposure to mustard gas at the Georgia Gulf plant. This evidence, the Irvins contend, would have established their entitlement to damages and defeated the Defendants' motion for summary judgment. The Defendants respond by arguing that the omitted material is not important to the Irvins' case because it does not change the fact that the Irvins failed to oppose the motion for summary judgment and, in the alternative, inclusion of the materials still does not establish the damages element of their claim.

Third, the Irvins argue that although the information they included in their motion for reconsideration was available to them when the Defendants' motion for summary judgment was filed, the Irvins were precluded from producing such evidence because the court's March 1, 2002, scheduling order had established an August 1, 2002, deadline for providing expert information. Therefore, the Irvins contend, because the deadline had already passed, they were unable to produce the relevant expert information without violating the court's scheduling order. The Defendants simply state that the additional evidence is not "new" because it was available to the Irvins at the time the Defendants filed their motion for summary judgment.

Finally, the Irvins maintain that the Defendants will not be prejudiced if the case is reopened. The Irvins argue that the Defendants were provided medical reports in the Irvins' responses to the Defendants' discovery requests. In addition, the Irvins suggest that because there are at least 78 similar cases that have been filed in relation to the same chemical release at issue here, the Defendants are imparted with knowledge of evidence on damages, causation, and liability, and therefore cannot claim prejudice if the case is reopened. Defendants respond by arguing that reopening the case would unfairly prejudice them as they have already expended substantial judicial resources in defending the matter pursuant to the court's March 1, 2002, scheduling order.

A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas*

Corp., 303 F.3d 571, 581 (5th Cir. 2002). This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990). Rather, Rule 59(e) "serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (internal quotations omitted). Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. *Clancy v. Employers Health Ins. Co., 101 F. Supp. 2d 463, 465 (E.D. La. 2000)* (citing 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2810.1, at 124 (2d ed. 1995)).

In *Lavespere*, this Court recognized that while a district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration, such discretion is not limitless. 910 F.2d at 174. This Court has identified two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts. *Id.* (citations omitted). The task for the district court is to strike the proper balance between these competing interests. Id.

In this case, the district court stated that a motion for new trial in a nonjury case or a petition for rehearing pursuant to a Rule 59(e) motion should be based upon manifest error of law or

mistake of fact, and a judgment should not be set aside except for substantial reasons. The district found that the Defendants' motion for summary judgment was filed while the Irvins "were represented by counsel, who did not request a continuance of the motion or a rescheduling of the deadlines." The district court also noted that it ruled on the unopposed motion more than sixty days after it was filed, and then issued judgment nearly three weeks later. In denying the Irvins' motion for reconsideration, the district court stated:

> [The Irvins] had ample time prior to the ruling to express some form of opposition to the disposition of their claims or to request additional time to respond. [The Irvins] have been parties to this matter for nearly six years; they have had more than enough opportunities for a "day in court."

We have held that an unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration. *Russ v. Int'l Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991). In this case, the underlying facts were well within the Irvins' knowledge prior to the district court's entry of judgment. However, the Irvins failed to include these materials in any form of opposition or response to the Defendants' motion for summary judgment. Although the Irvins correctly point out that they were not represented by counsel for approximately five months between March and August 2002, they were represented by counsel, George Tucker, before the Defendants filed

their motion for summary judgment and after the district court subsequently granted the motion.[3]

By denying the Irvins' motion for reconsideration, the district court's decision is not manifestly unjust in law or fact, nor does it ignore newly discovered evidence. The district court reasonably determined that the facts in this case do not warrant the extraordinary relief associated with the granting of a motion for reconsideration. Therefore, the district court did not abuse its discretion in denying the Irvins' Rule 59(e) motion.

II. Whether the Defendants' motion for summary judgment was based upon factual misrepresentations.

The Irvins maintain that the judgment dismissing their case was premised on representations of material facts that Defendants knew to be false. Specifically, the Irvins point to two alleged misrepresentations made by Defendants: 1) that the Irvins had not identified any expert witnesses on issues of liability, causation, or damages to support their claims; and 2) that the Irvins had not submitted any expert reports. The Irvins refute these statements, arguing that even though the Irvins had not complied with the deadlines established by the court's scheduling order, the Defendants were still in possession of "a wealth of expert information and reports" establishing causation and damages in the form of responses to interrogatories and requests for production. In

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[3] At no point during the pendency of this case have the Irvins alleged that any of their counsel were incompetent or incapable of pursuing their case.

addition, the Irvins contend that their interrogatory responses identified experts they intended to use at trial.

Conversely, the Defendants argue that they have accurately reported all the facts and circumstances supporting their motion for summary judgment, including the Irvins' failure to identify any expert witnesses or provide expert reports on the issues of liability, causation, and damages.

Summary judgment is appropriate where the underlying facts are undisputed, and the record reveals no evidence from which reasonable persons might draw conflicting inferences about the facts. *Prinzi v. Keydril Co.*, 738 F.2d 707, 709 (5th Cir. 1984). The district court based its ruling on the finding that the Irvins had not produced any medical evidence, and therefore could not establish that they suffered damages, an essential element of their case. The district court cites *Celotex*, 477 U.S. at 322-23, for the rule that a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. In addition, Fed. R. Civ. P. 56 mandates that summary judgment shall be entered against a non-movant who fails to set forth specific facts showing that there is a genuine issue for trial.

The Irvins did not deny or controvert the Defendants' statement of undisputed facts, including the representations made by the Defendants that the Irvins had not "identified any expert witnesses on issues of liability, causation, or damages" or "submitted any expert reports to support their claim." For that reason, those facts as stated were

deemed admitted. Uniform Local Rule, 56.2. However, in the event the moving party relates facts in its summary judgment motion that are untrue or inaccurate, and the court subsequently relies on those misstatements in making its decision, it would be improper to allow the moving party to benefit in such a situation.

After reviewing the record, it seems clear that the Irvins indeed failed to provide either of the two items as detailed by the Defendants. In its ruling granting the Defendants summary judgment, the district court appears to have inadvertently broadened what the Defendants related in their summary judgment motion. Specifically, the court states that the Irvins failed to produce "any medical evidence." (Emphasis added). The Irvins did in fact respond to written interrogatories as well as provide opposing counsel copies of treating physician reports.[4] However, while these discovery responses may have constituted medical evidence, the Defendants did not state that the Irvins failed to provide *evidence*, but rather that the Irvins had not produced *expert witness lists or expert reports*.[5] The real problem facing the Irvins is their basic failure to include this evidence in any form of opposition to the Defendants' summary judgment motion. As such, the district court's grant-

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[4] The interrogatory responses were not identified in the record.

[5] The treating physician reports submitted by the Irvins would most certainly not satisfy the requirements established by Rule 56(c) and 56(e) for sworn, authenticated summary judgment evidence.

ing of the Defendants' motion was properly based on true and correct statements of fact.

III. Whether the district court ever reached the issue of the Defendants' motion for involuntary dismissal, and if so, whether the granting of the motion was an abuse of discretion.

The Irvins insist that the district court based its ruling on the Irvins' failure to comply with the court's scheduling order. They argue that although the district court characterized its dismissal of the Irvins' case as a grant of summary judgment, the court's rationale for its decision "is more properly viewed as an involuntary sanction dismissal" under Fed. R. Civ. P. 16(f), 37(b), and 41(b) for a party's failure to appear at a pretrial conference, obey discovery orders, or prosecute an action. In response, the Defendants argue that the district court never ruled on their motion to dismiss, but if the court had, involuntary dismissal would be appropriate.

Based on a review of the district court's ruling, it appears clear from the reasons the district court articulates that its decision was premised solely on the failure of the Irvins to respond to or oppose the Defendants' motion for summary judgment. The summary judgment ruling states that because the Irvins could not "establish that they suffered damages, an essential element of their case[,] Defendants are entitled to summary judgment as a matter of law." In addition, the district court specifically states that it found it "unnecessary . . . to consider the alternative motion to

dismiss." Therefore, the Irvins' third and final issue on appeal is without merit.

CONCLUSION

Having carefully reviewed the record of this case, the parties' respective briefing and arguments, and for the reasons set forth above, we affirm the district court's granting of the Defendants' motion for summary judgment and its subsequent denial of the Irvins' Rule 59(e) motion to alter, amend, or reconsider.

AFFIRMED.

DENNIS, Circuit Judge, dissenting:

"Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice."[6] When a party moves to alter or amend a judgment under Rule 59(e), a district court is obligated to balance carefully the need for finality with the need to render a just decision *on the basis of all the facts.*[7] That obligation is increased "when the judgment, absent amendment, creates or results in a manifest injustice."[8] In this case, the need to render a just decision outweighed the need for finality, but the court did not render a just decision.

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[6] 11 Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2803 (1995).

[7] 11 Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2803 (1995).

[8] 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[5][a][v] (Matthew Bender 3d ed. 2003).

Instead, the district court provided no indication that it even considered the additional evidence that plaintiffs submitted with their Rule 59 Motion.[9] The district court, however, for the reasons discussed below, was obligated to consider the additional evidence. Accordingly, we should remand this case to the district court with orders to consider plaintiffs' additional evidence and reconsider the summary judgment in light of that evidence. Because the majority opinion does not require such a reconsideration, I respectfully dissent.

The Irvins submitted a Rule 59(e) motion to the district court that contained evidence that had not been presented to the district court previously. Specifically, it contained reports from Irvin's treating physicians that had been submitted in response to defendants' Interrogatories and Requests for Productions of Documents as well as an affidavit from Irvin.

The majority reviews the district court decision "as if the district court did not consider the additional materials," implicitly holding that the district court did not abuse its discretion in failing to consider the materials.[10] Considering the unique

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[9] Even if, as a technical matter, the district court considered the additional evidence, its opinion provides no analysis or discussion of that evidence. Accordingly, I agree with the majority that, for purposes of this appeal, we should review the judgment as if the district court did not consider the evidence attached to the Rule 59 motion.

[10] The majority states that we should review the district court's Rule 59 decision *de novo* if the court considered the additional evidence, but only for an abuse of discretion if it did not consider the additional evidence. This approach is

and extraordinary history of this case, however, I believe that the district court's failure to consider this information was a misuse of judicial discretion.

As this court has explained in *Lavespere v. Niagara Machine & Tool Works, Inc.*,[11] when a party "seeks to upset a summary judgment on the basis of evidence [that the party] failed to introduce on time," the district court is obligated to weigh, *inter alia*, several factors in deciding whether to admit the evidence: (1) the reasons for the moving party's default, (2) the importance of the omitted evidence to the moving party's case, (3) whether the evidence was available to the movant before the non-movant filed the summary judgment motion, and (4) the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened.[12]

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incorrect. We review the district court's *decision to consider the new evidence* for an abuse of discretion. *Fletcher v. Apfel*, 210 F.3d 510, 512 (5th Cir. 2000). However, we review the actual challenge to the summary judgment on its merits *de novo* because that determination is an issue of law. *Id.*; *see also Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1999) *(en banc)* (stating that "when the Rule 59(e) motion seeks review of a grant of summary judgment, . . . we apply a *de novo* standard of review"); 12 James Wm. Moore et al., *Moore's Federal Practice* § 59.54[4][e] (Matthew Bender 3d ed. 2003). ("If the [Rule 59(e)] motion sought reconsideration of a grant of summary judgment, the appellate court will review the matter *de novo*.").

[11] 910 F.2d 167 (5th Cir. 1990).

[12] *See id.* at 174.

These factors, it should be noted, are simply illustrative and not exhaustive.[13] In particular, the *Lavespere* court utilized this framework, not to limit the scope of Rule 59(e), but to explain that Rule 59(e) motions provide the district court with "considerable discretion" and that they are "not controlled by the same exacting substantive requirements as Rule 60(b) motions."[14] Because Rule 59(e) motions are subject to much more stringent time requirements than Rule 60(b) motions, Rule 59(e) motions provide relief for the movant on grounds at least as broad as Rule 60 motions.[15] Rule 59(e), therefore, provides district courts with the power to consider equitable factors and provide relief for "any . . . reason justifying relief from the operation of the judgment."[16]

The equitable considerations under Rule 59(e) weigh in plaintiffs' favor when one considers the unique facts of this case. Specifically, (1) the

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[13] *See id.* (noting that the district court should consider these four factors "among other things").

[14] *See id.*

[15] *See id.; see also Smith v. Morris & Manning*, 657 F. Supp. 180, 181 (S.D.N.Y 1987) (When filing a motion under Rule 59(e), "[a party] need not meet the somewhat stringent requirements of Rule 60, which is aimed at protecting the finality of judgments from belated attack.").

[16] *See Fed. R. Civ. P.* 60(b)(6); *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1987) (noting that Rule 60(b)(6) provides district courts with "authority adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," but that such power should only be used in "extraordinary circumstances.") (internal quotations omitted).

Irvin's "default" resulted, not through any fault of their own but because of egregious lawyer misconduct causing them virtually total deprivation of representation and the benefits of the adversary system of justice; (2) the omitted evidence was essential to the Irvin's case; (3) the evidence was made available to defendants-movants before they filed their motion for summary judgment; and (4) defendants in this case would not have been prejudiced by an introduction of the evidence because plaintiffs had already provided them with the evidence.

First, the plaintiffs did not present the evidence to the district court initially, through no fault of their own, but because they were subjected to attorney conduct and inaction so egregious that it "amounted to nothing short of leaving [them] unrepresented."[17] While it is true that a district court has the discretion to refuse to use Rule 59 to "rescue" a plaintiff from simple negligence, or a "blunder" by his attorney,[18] the facts of this case go far beyond a simple blunder by a plaintiff's attorney. The conduct of the Irvins' attorneys in this case constitutes "neglect so gross that it is inexcusable."[19]

The district court imposed five discovery deadlines between March 15th, 2002 and August 1st, 2002 on which plaintiffs were obligated to act. They were required to produce current medical

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[17] *Boughner v. Secretary of HEW*, 572 F.2d 976, 977 (3rd Cir. 1978).

[18] *See Lavespere*, 910 F.2d at 173.

[19] *Boughner*, 572 F.2d at 978.

reports and releases by March 15th. They were required to obtain all existing discovery from other counsel of record by April 30th. They were required to propound additional non-repetitive discovery by May 31st. They were required to file a list of treating physicians and all other experts with the court by July 1st. They were required to submit their medical expert reports by August 1st. The plaintiffs were *literally* without counsel during the entire period spanning these deadlines. Indeed, the counsel that had been representing them previous to those deadlines withdrew-with the court's permission-the day before the first deadline. In short, the Irvins were completely without counsel-a situation permitted by the district court-during the period of time that assistance of counsel was most crucial to the Irvins' case.[20]

Both the district court and the majority opinion minimize the impact of the Irvins' lack of counsel during this critical period. They note that George Tucker enrolled as the Irvins' counsel on August 22nd and represented them when defendants filed their summary judgment motion on August 30th. This "representation," however, was virtually non-existent. From the record, it appears that all Tucker did on behalf of the Irvins was attend one status conference. He filed no papers with the court in response to the summary judg-

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[20] This consideration is even more important in a complex toxic tort case such as this one in which the court cannot expect a lay person to understand the issues of medical causation and the necessity of expert testimony to prove the case.

ment motion and moved to withdraw from representation of plaintiffs five days after the court granted summary judgment.

At least one other circuit recognizes that an attorney's inaction over a sustained period can be so detrimental to a client as to constitute "neglect so gross that it is inexcusable."[21] Specifically, the Third Circuit has held that it is an abuse of discretion for a district court to refuse to grant a party relief under Rule 60(b) when that party's attorney engages in "egregious conduct [that] amounts to nothing short of leaving his clients unrepresented."[22]

The motion in front of us today presents such egregious conduct. Plaintiffs were literally without enrolled counsel during the most critical stages of the proceedings in a factually complex case. Although it is true that at an earlier stage of the case the plaintiffs were represented by a lawyer who collected the evidence in question and submitted it to the defendants, the plaintiffs were completely without counsel during the critical period when that evidence could have been presented to the court. Upon obtaining counsel

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[21] *Boughner*, 572 F.2d at 978.

[22] *See id.* at 977. As noted above, *Boughner* was decided under Rule 60, not Rule 59. To the extent this distinction makes a difference, it works in favor of the plaintiffs here because, as explained above, a party should obtain district court relief more easily under Rule 59 than Rule 60. *See Lavespere*, 910 F.2d at 173-74 (noting that Rule 59 "is not controlled by the same exacting substantive requirements" as Rule 60); see also, supra, notes 8-11 and ac-companying text.

again, plaintiffs immediately filed the present Rule 59 Motion and submitted the required evidence.

Second, the omitted evidence was critical to the Irvin's case because the evidence, had the court accepted it, arguably creates a dispute of material fact that would have allowed the Irvins to defeat summary judgment. Therefore, the second *Lavespere* factor also weighs in the Irvins' favor.[23]

Finally, the defendants would not be prejudiced by the admission of this evidence because the plaintiffs provided defendants with the rele-

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[23] The majority implies that summary judgment may be appropriate even if the district court were to consider the additional evidence. Specifically, the majority asserts in footnote 5 that "the treating physician reports submitted by the Irvins would most certainly not satisfy the requirements established by Rule 56(c) and 56(e) for sworn, authenticated summary judgment evidence." This issue is not as clear-cut as the majority indicates. Though sworn affidavits are the typical evidence used to counter motions for summary judgment, "Rule *56* does not require that a moving party support its motion with affidavits." *Salas v. Carpenter,* 980 F.2d 299, 304 (5th Cir 1992) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). Instead, Rule 56(c) specifically states that the court should consider "the pleadings, depositions, answers to interrogatories, and admissions on file" in addition to affidavits when ruling on a motion for summary judgment. The record in this case establishes that these treating physician reports were included in responses to interrogatories by the defendants. It is not clear how the totality of the evidence will bear on the motion for summary judgment. Such a decision should be for the district court in the first instance after it properly considers the evidence submitted with the *Rule 59* motion. *See, e.g., Boughner,* 572 F.2d at 979 (remanding case to district court for reconsideration after reversing district court denial of appellant's Rule 60 motion).

vant information in September of 2000, almost two years before defendants filed their summary judgment motion.[24] Accordingly, the district court would not have harmed the defendants by accepting and considering the evidence submitted with the Rule 59 motion.

In short, proper application of the factors that this court has instructed district courts to use in deciding whether to consider additional evidence submitted with a Rule 59 motion should have led the district court to consider the evidence.[25]

There is, of course, a need for finality of judgments. However, in an extraordinary case such as this—where plaintiffs had evidence arguably sufficient to survive summary judgment, submitted that evidence to defendants, and failed to provide the evidence to the court in a timely manner due only to a complete abandonment by the legal system—the district court misused its discretion in denying the Rule 59(e) motion without considering the relevant evidence submitted with it.

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[24] It is also worth noting in this context that the district court has presided over many other cases involving this same chemical spill. In exercising its discretion in deciding whether to consider plaintiffs' additional evidence, the district court should have also considered the likelihood, based on its experience in these other cases, that plaintiff's additional evidence was relevant to the merits of the summary judgment motion.

[25] To the extent that judicial economy is also a factor in a Rule 59 analysis, it is also worth noting that the district court could have accepted the evidence with almost no additional burden. It simply had to review what the plaintiffs submitted with the Rule 59 motion.

Accordingly, I would vacate the summary judgment and remand this case to the district court with instructions to consider the evidence that plaintiffs submitted with their Rule 59 motion before acting on the motion.

Respectfully, I dissent.

Appendix C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LUCIEN TEMPLET, ET AL

VERSUS

HYDROCHEM, INC., ET AL

CIVIL ACTION

NO. 99-206-A

[February 4, 2003, filed]

RULING ON MOTION TO ALTER, AMEND AND RECONSIDER JUDGMENT

This matter is before the court on a motion by plaintiffs, Jimmy and Melba Irvin, individually and on behalf of their minor child, Adam Irvin, to alter, amend, and reconsider judgment (doc. 129). Defendants, Georgia Gulf Corporation ("Georgia Gulf"), X.L. Insurance Company, Ltd., HydroChem Industrial Services, Inc., Payne & Keller Company, Inc., Master Maintenance & Construction, Inc., Amoco Energy Trading Corporation, Louisiana Intrastate Gas Company, L.L.C., and LIG Liquids

Company, L.L.C., oppose the motion. There is no need for oral argument.

This action relating to the accidental release of mustard gas at the Georgia Gulf facility in Plaquemine, Louisiana, on September 25, 1996, was originally filed on November 8, 1996 in state court. As noted in the prior ruling by the court, Jimmy Lee Irvin was added as a plaintiff on March 21, 1997; his wife, Melba, and their minor son, Adam, were added on May 12, 1997. On January 7, 2002, the Irvins filed a Motion to Establish Discovery Cutoff and Trial Dates and/or for Status Conference, requesting additional time to conduct discovery and provide expert reports. On March 1, 2002, the court entered a final scheduling order setting forth, among others, the following deadlines, requiring the Irvins to: (a) provide defendants with all medical reports by March 15, 2002; (b) list all treating physicians and identify all experts by July 1, 2002; and (c) submit all expert reports by August 1, 2002. The Irvins failed to meet each of these court-imposed deadlines.

In its March 1 order, the magistrate judge also set another status conference for July 12, 2002. On March 15, 2002 an order authorizing withdrawal of counsel for the Irvins was signed. Neither the Irvins nor counsel appeared at the July 12 status conference.

The order entered following that status conference recites that the Irvins "are the only remaining plaintiff and the deadlines for discovery, etc. have already been entered as to these plaintiffs." (doc. 150). The record shows that a copy of that

order was sent by the Clerk of Court to Mr. Irvin and to Mrs. Irvin personally. On August 26, 2002 an order enrolling George R. Tucker as counsel for the Irvins was entered. On August 27, 2002 a status conference before the district judge was held and the order entered following that conference shows that Mr. Tucker attended on behalf of the Irvins.

Three days later, on August 30, 2002, defendants filed a motion for summary judgment on the grounds that plaintiffs failed to timely identify experts or provide expert reports on the issues of negligence, injury, causation, or damages, and thus could not prove their case (doc. 115). In the alternative, defendants sought dismissal of the claims by plaintiffs on the grounds that plaintiffs failed to provide discovery relating to experts and repeatedly failed to abide by court-ordered deadlines.

Plaintiffs were represented by counsel at that time and filed no response to the motion.

Sixty days later, on October 30, 2002, the court granted the motion for summary judgment on the grounds that plaintiffs' complete failure of proof concerning damages, an essential element of their toxic tort case, renders all other facts immaterial (doc. 124). The court entered judgment based on the ruling on November 21, 2002 (doc. 127).

Plaintiffs seek reconsideration of the judgment entered November 21, 2002 in this matter on the grounds that they were unrepresented by counsel from March 14, 2002 through August 22, 2002,

during which time most of the deadlines in this case passed, and that medical evidence does exist to support their claims.

A motion for a new trial in a nonjury case or a petition for rehearing pursuant to Fed. R. Civ. Pro, 59 should be based upon manifest error of law or mistake of fact, and a judgment should not beset aside except for substantial reasons.[1] The motion for summary judgment was filed while plaintiffs were represented by counsel, who did not request a continuance of the motion or a rescheduling of deadlines. The court ruled on the unopposed motion more than sixty days after it was filed. The court then issued judgment nearly three (3) weeks later. Plaintiffs had ample time prior to the ruling to express some form of opposition to the disposition of their claims or to request additional time to respond. Plaintiffs have been parties to this matter for nearly six years; they have had more than enough opportunities for a "day in court"

Accordingly, for the reasons assigned, the motion by plaintiffs, Jimmy and Melba Irvin, individually and on behalf of their minor child, Adam Irvin, to alter, amend, and reconsider judgment (doc. 129), is hereby **DENIED**.

Baton Rouge, Louisiana, February 4, 2003.

/s/ JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

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[1] Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d §2804.

Appendix D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LUCIEN TEMPLET, ET AL

VERSUS

HYDROCHEM, INC., ET AL

CIVIL ACTION

NO. 99-206-A

[November 21, 2002 Filed]

JUDGMENT

For the written reasons assigned and filed herein on October 30, 2002 (doc. 124);

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered herein in favor of defendants , Georgia Gulf Corporation, X.L. Insurance Company, Ltd., HydroChem Industrial Services, Inc., Payne & Keller Company, Inc., Master Maintenance & Construction, Inc., Amoco Energy Trading Corporation, Louisiana Intrastate Gas Company, L.L.C., and against plaintiffs, Jimmy Irvin, Melba Irvin and Adam Irvin, and this action is hereby dismissed with prejudice.

Baton Rouge, Louisiana, November 21, 2002.

/s/
JOHN V. PARKER, JUDGE
MIDDLE DISTRICT OF LOUISIANA

Appendix E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LUCIEN TEMPLET, ET AL

CIVIL ACTION

VERSUS

NO. 99-206-A

HYDROCHEM, INC., ET AL

[October 30, 2002, filed]

RULING ON MOTION FOR SUMMARY JUDGMENT OR DISMISSAL

This matter is before the court on a motion by defendants, Georgia Gulf Corporation ("Georgia Gulf"), X.L. Insurance Company, Ltd., HydroChem Industrial Services, Inc., Payne & Keller Company, Inc., Master Maintenance & Construction, Inc., Amoco Energy Trading Corporation, Louisiana Intrastate Gas Company, L.L.C., and LIG Liquids Company, L.L.C., for summary judgment or dismissal (doc. 115). No opposition has been filed. Removal subject matter jurisdiction is based upon the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §201 et seq. There is no need for oral argument.

This matter stems from the accidental release of mustard gas at a Georgia Gulf Corporation plant in Plaquemine, Louisiana, on September 25, 1996. Jimmy Irvin, Melba Irvin, and Adam Irvin are the only remaining plaintiffs in this matter.

Defendants seek summary judgment on the grounds that plaintiffs have failed to timely identify experts or provide expert reports on the issues of negligence, injury, causation or damages, and thus cannot prove their case. In the alternative, defendants seek dismissal of the claims by plaintiffs on the grounds that plaintiffs have failed to provide discovery relating to experts and have repeatedly failed to abide by court-ordered deadlines.

Undisputed Facts

The following facts are taken from the statement of uncontested material facts in support of motion for summary judgment filed by defendants. In accordance with LR56.2, all material facts set forth in the statement required to be served by the moving are deemed admitted, for purposes of the motion, unless controverted. Accordingly, since no opposition or statement of contested facts has been filed in response to the motion for summary judgment, all facts set forth by defendants in support of the motion are deemed admitted.

1. This action was originally filed on November 8, 1996 in state court.

2. Jimmy Lee Irvin was added as a plaintiff on March 21, 1997; his wife, Melba, and their minor son, Adam, were added on May 12, 1997.

3. The Irvins allege that their injuries were due

to the negligence of at least sixteen defendants arising from a complex interaction of chemicals and natural gas during a refinery clean-up. More specifically, the Irvins allege that natural gas supplied by defendants Amoco Pipeline Company, Amoco Energy Trading Corporation and Louisiana Interstate Gas Company contained impurities, which reacted with chemicals associated with Georgia Gulf's "VCM" unit creating "several types of mustard agents."

4. On January 7, 2002, the Irvins filed a Motion to Establish Discovery Cutoff and Trial Dates and/or Status Conference, requesting additional time to conduct discovery and provide expert reports.

5. On March 1, 2002, the court entered a final scheduling order setting forth, among others, the following deadlines, requiring the Irvins to: (a) provide defendants with all medical reports by March 15, 2002; (b) list all treating physicians and identify all experts by July 1, 2002; and (c) submit all expert reports by August 1, 2002.

6. The Irvins failed to meet each of these court-imposed deadlines.

7. In its March 1 order, the court also set another status conference for July 12, 2002. Neither the Irvins nor their counsel appeared at the July 12 status conference.

8. To date, the Irvins have not identified any

expert witnesses on issues of liability, causation or damages to support their claims as required by the court.

9. To date, the Irvins have not submitted any expert reports to support their claims as required by the court.

Argument

In support of the motion for summary judgment, defendants first argue that the Irvins are unable to satisfy their burden of proof on any essential element because they lack expert testimony. Defendants argue that the merits of this matter are technical and complex beyond the common knowledge and understanding of lay witnesses and jurors. Defendants argue that plaintiffs are required to submit expert evidence regarding the formation and release of the mustard agent, including evidence that those events were due to the negligence of Georgia Gulf. Further, defendants argue that expert and medical evidence is required to show the causal connection between the alleged chemical exposure and subsequent injuries to plaintiffs.

Defendants also argue that the claims by plaintiffs should be dismissed for failure to abide by court-ordered deadlines in this case. Defendants argue that plaintiffs have failed to produce expert testimony and failed to attend the July 12, 2002 status conference.

Law and Discussion

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] The party seeking summary judgment bears the initial burden of asserting the basis of the motion and demonstrating the absence of a genuine issue of material fact; he need not negate the nonmovant's claim?[2] Substantive law guides the determination as to which facts are material, and because the issues of material fact must be genuine, the presence of some alleged factual disputes, depending on what they are, will not necessarily defeat the motion.[3] The movant may discharge his burden by "'showing' - that is, pointing out to the district court that there is an absence of evidence to support the nonmoving party's case."[4]

It is not necessary for the moving party to introduce any evidence in order to prevail on summary judgment.[5] Rather, at least in cases where the nonmoving party will bear the burden of proof at trial, the movant may seek summary judgment

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[1] Fed R. Civ. P. 56(c)

[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Little v, Liquid Air Corp.*, 37 F.3d 1069,1075 (5th Cir. 1994).

[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248,106 S.Ct. 2505, 2510, 91L.Ed.2d 202 (1986); *Abbot v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993).

[4] *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554.

[5] 10A Wright, Miller & Kane § 2727, p. 474.

by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment rendered against him.[6] In this case, plaintiffs have alleged that they suffered harm by exposure to the mustard gas release but have failed to produce any evidence whatsoever of such injury. In a toxic tort case such as this is medical evidence is essential to establish harm to plaintiffs. Without having produced any medical evidence, plaintiffs cannot establish that they suffered damages, an essential element of their case. Plaintiffs may not rely solely upon allegations or denials of the pleadings,[7] and a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[8] Defendants are entitled to summary judgment as a matter of law.

It is unnecessary for the court to consider the alternative motion to dismiss.

Accordingly, for the reasons assigned, the motion by defendants, Georgia Gulf Corporation, X.L. Insurance Company, Ltd., HydroChem Industrial Services, Inc., Payne & Keller Company, Inc., Master Maintenance & Construction, Inc., Amoco Energy Trading Corporation, Louisiana Intrastate Gas Company, L.L.C., and LIG Liquids Company,

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[6] *Id.*

[7] Fed. R.CiV.P 56(e); *Anderson*, 477 U.S. at 248,106 S.Ct. at 2510; *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th 1992).

[8] **Celotex**, 477 U.S. at 322-323, 106 S.Ct. at 2552; *see* **Little**, 37 F.3d at 1075.

L.L.C., for summary judgment or dismissal (doc. 115) is hereby **GRANTED** and this matter shall be **DISMISSED**, with prejudice.

Baton Rouge, Louisiana, October 30, 2002.

JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

Appendix F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Ken Acosta, et al.

Civil Action

versus

No. 98-1065-A

Master Maintenance &
Construction, Inc., et al.

[June 9, 1999 Filed]

RULING ON MOTIONS

This matter is before the court on: (1) a Motion to Remand by plaintiffs, Lucien Templet, et al and (2) a Motion to Dismiss and/or for Summary Judgment by the defendant, Amoco Pipeline Company. The defendants, Amoco Production

Company, Amoco Energy Trading Corporation, Georgia Gulf Corporation, Primex, Ltd. and X. L. Insurance Co., Ltd., oppose the motion by plaintiffs to remand.[1] Plaintiffs have not filed an opposition to Amoco Pipeline Company's motion. There is no need for oral argument. This action was removed to this court on March 5, 1999 by defendants, X. L. Insurance Company Ltd. and Primex Ltd. Removal jurisdiction is allegedly based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, et seq.

I. MOTION TO REMAND

With few exceptions, the present matter raises virtually identical issues to those presented before this court in **Ken Acosta v. Master Maintenance & Construction, et al**, No. 98-1065-A (M.D. La. March 2, 1999). Both actions arise from an alleged chemical exposure of workers at the Georgia Gulf facility in Plaquemine, Louisiana on September 25, 1996. Most of the issues raised by the plaintiffs in the present motion to remand were addressed by this court in the **Acosta** ruling. In fact, the Templet plaintiffs adopt many of the arguments and cite some of the same legal authorities relied upon by the **Acosta** plaintiffs.

However, the Templet plaintiffs argue that this case is distinguishable on the following grounds: (1) the Louisiana Interstate Gas ("LJG") defen-

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[1] Also named as defendants in this care are: Master Maintenance & Construction, Inc., Payne & Keller, Amoco Pipeline Company, Louisiana interstate gas, L.L.C., Equitable Resources, Inc., X.L. Insurance Company, Ltd., Primex, Ltd., and Associated electric & Gas Insurance Services, Ltd.

dants did not reach a settlement agreement with these plaintiffs and have not consented to removal.[2] Therefore, consent of all defendants, as required under 9 U.S.C. § 205, is lacking; (2) the removing defendants waived their rights to remove by mistakenly including the Templet case in their December 1998 removal notices; and (3) the state court's order denying class certification has been appealed to the Louisiana First Circuit Court of Appeal, thus removal was improper and untimely.

For the purpose of this ruling, the court adopts the **Acosta** ruling, and reasons set forth therein, and limits this ruling to the three alleged distinctions raised by Templet in his Motion to Remand.

A. CONSENT OF ALL DEFENDANTS

Plaintiffs argue that the defendants, in their notice of removal, have attached consent forms of several defendants, but not all. Specifically, they argue that the consent of the LIG defendants has not been obtained. Plaintiffs contend that since they, unlike the **Acosta** defendants, have not settled with the LIG defendants, the case is distinguishable. Since there has been no settlement, the LIG defendants cannot be considered nominal parties. Furthermore, they argue that since all defendants have failed to timely consent to the removal, remand is in order.[3]

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[2] The Louisiana Interstate Gas defendants consist of: Louisiana Interstate Gas Company, L.L.C. and Louisiana Interstate Gas Corporation.

[3] The court notes that defendants in opposition to the motion to remand have submitted a notice of consent to removal from the LIG defendants. However, this notice of con-

In **Acosta**, this court noted that the LIG defendants, if required to consent under 9 U.S.C. § 205, were nominal defendants and would not be required to consent to the removal of this case since they have for all purposes settled with the **Acosta** plaintiffs.[4] The classification of the LIG defendants as nominal in the **Acosta** matter, was however, made only after the court held that consent of all non-removing defendants is not required when removing under 9 U.S.C. § 205.[5]

The dispute in **Acosta**, as in this case, revolved around the parties differing interpretation of phrase in 9 U.S.C. § 205 which states: "the defendant or the defendants may... remove such action..." After considering both the policies underlying the Convention and its removal statute and without restating all of the reasoning of **Acosta**, this court concluded that to require consent of all defendants would defeat the legislative purpose of §205 and the broad construction given to it under prior case law.[6] The court sees no reason to vary that ruling today simply because these plaintiffs have not settled with the LIG defendants. The consent of all non-removing defendants is not re-

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sent was not attached with the notice of removal and will not be considered as a valid consent for the purposes of this motion. See **Farias v. Bexar County Board of Trustees for Mental Health Mental Retardation Services**, 925 F.2d 866, 871 (5th Cir. 1991), cert. denied 502 U.S. 866, 112 S.Ct. 193, 116 L.Ed.2d 153 (1991), (citing to **Getty Oil Corp. v. Insurance Company of North America**, 841 F.2d 1254, 1262 (5th Cir.1988)).

[4] See **Acosta**, p. 18-21.

[5] Id at 15-21.

[6] Id.

quired under the statutes implementing the Convention.

B. WAIVER OF RIGHT

Plaintiffs next contend that the defendants have effectively waived their right to removal through certain actions — that the defendants have repudiated prior removals not once but twice.

In the first attempt, removal was attempted in January of 1997 by the defendant HydroChem on the grounds of diversity of citizenship. Thereafter, the defendants voluntarily consented to remand and remand was ordered. Since the first attempt at removal was based on diversity of citizenship, the first attempt is irrelevant to this discussion.[7] Furthermore, the removing defendants, X.L. and Primex, along with their insured Georgia Gulf, were not parties to the action at the time that removal occurred; they were added by amending petition later.

The second alleged repudiated removal occurred when the defendants removed **Acosta** and similar cases in December of 1998. This case was mistakenly included on the defendants' notice of removal; this case was not removed at that time. Plaintiffs argue that repeatedly removing a case should be considered a waiver. No authority is offered in support of that notion.

As stated in **Acosta**, waiver of an insurer's right to remove under the Convention must be ex-

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[7] See **Acosta**, at 2, n. 2 (citing **S.W.S. Erectors Inc. v. Infax, Inc.**, 72 F.3d 489 (5th Cir. 1996).

plicit.[8] The mistaken inclusion of the Templet case in the earlier notice of removal was simply a typographical error and was not an intentional relinquishment of a known right, let alone an express waiver. Therefore, this court concludes that defendants have not waived their right to remove under the Convention Act.

C. APPEAL ON CLASS CERTIFICATION

Lastly, the Templet plaintiffs contend that the 18th Judicial District Court issued what amounted to a final judgment on the motion to certify the case as a class action. Plaintiffs argue that prior to removal of this action, this matter was pending before the Louisiana First Circuit Court of Appeal. They contend that removal of the case while an appeal was pending improper. They also suggest that the class certification hearing in the state court amounted to a decision on the merits of the case. Since a decision on the merits has been made, they argue that under 9 U.S.C. § 205, removal of this action was improper because it occurred after a trial on the merits. Plaintiffs suggest that allowing the defendants to remove this case risks depriving them of their opportunity for appellate review of the class action issue.

Once again, referring to this court's decision in **Acosta**, the court held that the plain language of 9 U.S.C. § 205 permits removal "at any time before trial".[9] The decision made by the Louisiana

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[8] See **Acosta**, p. 7 (citing **McDermott International, Inc. V. Lloyds Underwriting of London**, 944 F.2d 1199, 1209 (5th Cir. 1991)).

[9] See **Acosta**, p. 10.

state court to deny class certification was not a final judgment or a trial on the merits; it was an interlocutory order that occurred well before trial.[10] Under 9 U.S.C. §205, it matters not whether there is a proceeding pending in an appellate court, as long as it occurs "at any time before the trial". It is clear that the term "trial" means that removal may occur at any time before an adjudication on the merits.[11]

Contrary to the position of plaintiffs, there is no conflict between the federal and state courts. Once a case is removed, the state court is divested of jurisdiction.[12] Upon denial of the motion to remand, this case will be governed by federal procedural law.[13] Furthermore, a case removed from state court arrives in the federal system in the same condition in which it left the state system.[14] "If the notice of appeal was adequate in the state court system, it should be deemed adequate when it enters the federal courts, regardless of whether

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[10] A denial or grant of class certification is not a final judgment. It is capable of being amended, altered or recalled prior to a final judgment. (see **Gardner v. Westinghouse Broad Co.**, 437 U.S. 478, 480 n.6 (1978); Fed R. Civ. P. 23(c)(1); La.C.C.P. art. 592(A)(3)(c)).

[11] See **Acosta** at 10.

[12] **In Re Matter of Meyerland Co.**, 960 F.2d 512(5th Cir. 1992).

[13] Id.

[14] **Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Etc.**, 415 U.S. 423, 435-36, 94 S.Ct. 1113, 1122-23, 39 L.Ed.2d 435 (1974).

the state technical requirements for notice of appeal differ from the federal."[15]

The court finds that no facts or issues which distinguish this case from the previous ruling in **Acosta**. Therefore, the motion to remand (doc. no. 5) is denied.

II. MOTION TO DISMISS/SUMMARY JUDGMENT

Defendant Amoco Pipeline Company ("Amoco Pipeline") also moves to be dismissed from this action and/or for summary judgment.

In the Templet state court petition, plaintiffs assert that Amoco Pipeline, Amoco Production Company, and Amoco Energy Trading Corporation allegedly supplied/sold contaminated natural gas to the Georgia Gulf facility causing and/or contributing to their being exposed to toxic chemicals on September 25, 1996.[16]

Amoco Pipeline claims that it was not involved in any manner with the sale/supply or natural Gas to the Georgia Gulf facility. It contends that Amoco Production Company and Amoco Energy Trading Corporation, while denying any liability, have confirmed that they are the properly named Amoco entities with respect to the allegations con-

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[15] **In Re Meyerland**, 960 F. 2d at 520 (citing **Granny Goose**, 415 U.S. at 435-36, 94 S.Ct. at 1122-23 ("Judicial economy is promoted by providing that proceedings that had in state court shall have force and effect in federal court, so that pleadings filed in state court, for example, need not be duplicated in federal court.").

[16] See Plaintiff's Third Supplemental and Amending Petition

cerning the sale/supply of natural gas to Georgia Gulf.

Mr. Lawrence B. Peck, the Vice President of Amoco Pipeline, through an affidavit, asserts that Amoco Pipeline lacked any involvement in the distribution of gas. Peck states the gas originated from several reserves and was treated/sweetened at Amoco Production facilities in Port Hudson and/or Judge Digby. He claims that Amoco Pipeline did not own or operate transportation equipment connected to or originating from any of the reserve fields; it does not own either of the facilities at Port Hudson or Judge Digby; nor was it involved in the transportation of the gas to the processing plants owned and operated by the LIG defendants or any other defendant which transported gas to Georgia Gulf.

When a party moves to dismiss under Fed. R. Civ. P. 12(b)(6) and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56".[17] In this case, the party has presented the court with an affidavit which the court deems imperative to the resolution of the motion at bar. Plaintiffs were on notice that the court might elect to consider the instant motion as one for summary judgment, since Amoco Pipeline framed its motion as one to dismiss for failure to state a claim and for summary judgment.

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[17] Fed. R. Civ. P. 12(b)(6)

Therefore, the court considers the motion as a motion for summary judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".[18] The court must view facts and inferences from the evidence in the light most favorable to the non-moving party.[19] Once the moving party has met its burden, the non-moving party, by submitting specific facts, must prove there is a genuine issue of material fact.[20]

The movant bears the initial responsibility of asserting the basis for his motion.[21] However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely "'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the non-moving party's case."[22] Once the movant produces such evidence, the non-movant must then direct the court's attention to evidence

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[18] Fed. R. Civ. P. 56(c)

[19] **Crescent towing v. M/V Amax**, 40 F.3d 741, 743 (5th Cir. 1994).

[20] **Matsushita Elec. Industries Co. v. Zenith Radio**, 475 U.S. 574, 585-587, 106 S.Ct. 1348, 1355-1356, 89 L.Ed.2d. 538 (1986).

[21] **Celotex Corp. v. Catrett**, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

[22] **Id.** at 325, 106 S.Ct. at 2554.

in the record sufficient to establish a genuine issue of material fact.[23]

In this case, the court finds that Amoco Pipeline, the movant, has met its burden of demonstrating that there are no material facts in dispute which would implicate it in any way in this matter. Plaintiffs, as non-movants, have not responded to the defendant's motion, much less presented any evidence that would establish a genuine issue of material fact. Therefore, Amoco Pipeline is entitled to judgment as a matter of law.

III. CONCLUSION

Accordingly, for the reasons assigned, the motion to remand by the plaintiffs Lucien Templet, et al (doc. no. 5) is hereby **DENIED**. The defendant, Amoco Pipeline Company's motion for dismissal under 12(b)(6) and/or summary judgment (doc. no. 7) is treated as a motion for summary judgment and is hereby **GRANTED**.

Baton Rouge, Louisiana, June 9, 1999.

JOHN V. PARKER,
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

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[23] **Id.** at 477 U.S. 322, 106 S.Ct. at 2552.

Appendix G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Ken Acosta, et al.

Civil Action

versus

No. 98-1065-A

Master Maintenance &
Construction, Inc., et al.

[March 2, 1999 Filed]

RULING ON MOTION TO REMAND

This matter is before the court on a motion to remand by plaintiffs, Kent Acosta, et al. The defendants, Georgia Gulf, Primex, Ltd. and X. L. Insurance Co., Ltd., oppose this motion. Oral arguments were held on January 15, 1999. Removal jurisdiction is allegedly based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, et seq.

I. PROCEDURAL HISTORY

This action arose from a mustard gas leak at the Georgia Gulf facility in Plaquemine, Louisiana on September 25, 1996. The plaintiffs are Kent Acosta, who was working for a Georgia Gulf subcontractor during the leak, and his family, who alleges that they may have come into contact with the gas after Mr. Acosta returned home.[1] At the

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[1] In addition to this action, there have been more than 75 suits filed in state court with more than 2000 claimants. The actions were apparently consolidated in state court for

time of the incident that gave rise to these claims, the defendant, Georgia Gulf, was insured by the defendants, Primex, Ltd, ("Primex") and X.L. Insurance Company ("X.L."). Primex is a Barbados corporation and X.L. is a Bermuda corporation.

On October 11, 1996, the plaintiffs filed an action in the 18th Judicial District for the Parish of Iberville against several defendants including Georgia Gulf. Pursuant to Louisiana's Direct Action Statute, Primex and X.L. were also named as defendants. In October of 1998, the plaintiffs and other parties in similar suits amended their claims to assert an intentional tort claim against Georgia Gulf. Basically, plaintiffs' amended claims allege that the release of mustard gas occurred over an extended period of time.

On December 23, 1998, the defendants, X.L. and Primex, removed this action to this court.[2] In their notice of removal, the defendants allege that the grounds for removal is a dispute over coverage between the foreign insurers and Georgia Gulf. The two foreign insurers claim that their insur-

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discovery purposes on February 18, 1997. In addition, some of these suits were consolidated for trial purposes in October of 1998, and are set for trial beginning in March of 1999. The defendants have removed 68 of these cases to this court. Only the Acosta action is presently before the court.

[2] Removal was attempted by the defendant Georgia Gulf on a prior occasion on the grounds of diversity. However, the defendant voluntarily consented to remand and the cases were ordered remanded. Since the first attempt at removal was based on diversity of citizenship, the first attempt is irrelevant to this discussion. *S.W.S. Erectors Inc. v. Infax, Inc.*, 72 F.3d 489 (5th Cir. 1996).

ance policies require that all coverage issues between Georgia Gulf and themselves be resolved through arbitration outside the United States. X.L.'s policy requires that all such disputes shall be conducted in London, England. Primex's contract with Georgia Gulf provides that coverage disputes shall be conducted in Barbados.

Primex and X.L. argue that because of the recent intentional tort allegations, a dispute has arisen between Georgia Gulf and themselves regarding coverage under their respective insurance contracts. Relying on 9 U.S.C. § 201 *et seq.*, all three defendants argue that the insurance companies have a right to remove the entire case to this court because the arbitration clauses contained in their respective policies are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The defendants assert that the subject matter of the plaintiffs' state court action is "related to" this agreement and likewise, is subject to removal.

Plaintiffs, however, disagree with the defendants' argument. They contend that removal was not proper, and this case should be remanded to state court for several substantive and procedural reasons. Plaintiffs argue that: (1) any dispute between Georgia Gulf and its insurers was waived because the insurers knew of coverage disputes but continued to provide a defense; (2) removal in this case was not timely because it did not take place before the resolution or argument of substantive issues of law or fact by the state court; (3) removal of this case does not satisfy the requirements under 9 U.S.C. § 201, et. seq, ("the Con-

vention Act") because there is no "relevant arbitration agreement . . . between the parties to the litigation"; (4) removal should not be allowed because not all defendants have consented to removal; and (5) in the alternative, the state court issues should be severed and remanded to state court.

II. APPLICABLE LAW

In October of 1968, the United States Senate ratified the United Nation's Convention on the Recognition of Foreign Arbitral Awards ("the Convention").[3] The goal of the Convention was "to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries".[4] The United States and Barbados, Primex's domiciliary country, are signatories to the Convention.[5] Bermuda, X.L.'s domiciliary country, is bound by the Convention pursuant to the United Kingdom's Instrument of Accession and subsequent extensions to Bermuda.[6]

Under the provisions of the Convention, the United States may only avail itself of the benefits of the Convention against other signatories to the

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[3] *See* Senate Comm. on Foreign Relations, Foreign Arbitral Awards, S. Rep. No. 702, 91st Cong., 2d Sess. 5 (1970) **reprinted in** 1970 U.S.C.C.A.N. 3601, 3602.

[4] *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974).

[5] *See* Defendants' Notice of Removal, PP 3-4

[6] *See* Defendants' Notice of Removal, PP 8; 11

extent it agrees to bind itself.[7] Therefore, the Convention Act, 9 U.S.C. § 201, et seq., was enacted by Congress to implement the Convention and bind the United States to its terms. Federal jurisdiction under these statutes is provided for in 9 U.S.C. § 203. It states:

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of Title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

In addition to the jurisdictional grant provided in 9 U.S.C. § 203, Congress also provided a separate and distinct statute for removal of Convention cases from state court. 9 U.S.C. § 205 provides:

> "Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of

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[7] Convention, Art. XIV.

> causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

According to the Fifth Circuit, the Congress, in creating and providing for original federal jurisdiction, also intended to provide the broadest removal statute in the federal code. The purpose behind such a liberal removal provision was to insure that there would be a uniform federal common law regarding international arbitral obligations.[8]

III. DISCUSSION

A. NO DISPUTE BETWEEN THE PARTIES

According to the Fifth Circuit, "an agreement falls under the Convention if the agreement: (1) is in writing; (2) is an agreement to arbitrate a dispute; (3) provides that arbitration will take place in the territory of a signatory to the convention; (4) arises out of a commercial legal relationship; and (5) is not entirely between citizens of the United States".[9] The two insurance contracts each

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[8] *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991)

[9] *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985).

contain an arbitration clause in which the parties (one of which is a foreign citizen) agree to arbitrate their disputes. Therefore, this court clearly has jurisdiction over a dispute between the parties to the insurance agreement.

Plaintiffs, however, argue that there is no real coverage dispute between the insurers and Georgia Gulf. They claim that Primex and X.L.'s allegations of newly discovered coverage disputes are "demonstratively untrue".[10] The plaintiffs assert that as early as December 1, 1996 approximately twenty cases were filed in state court alleging intentional torts. They argue that since the insurers knew of the intentional tort allegations in similar cases and the insurers have substantially participated in the state court litigation, the insurers have waived their right to removal. Also, the plaintiffs suggest the fact that Primex and Georgia Gulf were represented by the same attorney as late as December 9, 1997, demonstrates waiver of coverage disputes by Primex. They argue that as early as February 11, 1998, Primex and X.L. had basically admitted that they would not raise any coverage defense.[11] Plaintiffs contend that since

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[10] *See* Plaintiff's Motion in Support of Remand, p. 3.

[11] The admission arises from a deposition held on February 11, 1998 where defendant's counsel, Mr. Rolfs, made the following comments: "There is no objection to coverage, period, end of sentence... they waived [their right in the future to make a coverage objection]... I think it's a moot point... I'm telling you that there is no reservation as to coverage with respect to either one of these insurance carriers". Additionally, Mr. Koppus, attorney for XL, stated, "...XL does not object to covering the claim". Deposition of Tom Simon, p. 190-193

the defendants did not take any action to reserve their rights for two years, they waived their right to compel arbitration.

Plaintiffs argument, however, is flawed. First, this case is not amongst the twenty cases filed in state court which plaintiffs claim allege intentional tort. The court will not consider the pleadings in a separate suit as notice of a coverage dispute in this suit.[12]

Second, waiver of an insurer's right to remove under the Convention must be explicit.[13] In this case, no evidence has been offered to show that the insurers explicitly waived their right to removal. The comments by the insurers' lawyer regarding waiver at a deposition on February 11, 1998, did not amount to an explicit waiver of an arbitrable coverage dispute; neither does the fact that one of the attorneys previously represented both the insurer, Primex, and the insured, Georgia Gulf. At the time these statements were made and the representation occurred, there was simply no coverage dispute because at that time, there was no intentional tort problem. These actions occurred prior to either the plaintiffs or the insurers having knowledge of any alleged intentional conduct on the part of Georgia Gulf. The plaintiffs' intentional tort claim did not become apparent until depositions in August of 1998. Plaintiffs did not amend their suit until September 21, 1998.

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[12] This court notes that allegations of intentional tort in the twenty cases were extremely vague. The plaintiffs who made these allegations amended their pleadings in 1998 along with the other claimants to allege more specific facts.

[13] *McDermott International, Inc.*, 944 F.2d 1199.

Shortly thereafter, the insurers issued a reservation of rights letter to Georgia Gulf.[14]

Waiver is defined as the intentional relinquishment of a known right.[15] There is no evidence submitted which proves that the insurers intentionally released their right to arbitrate. The insurers' attorney could not explicitly waive an unknown arbitrable coverage issue that was not discovered until August 1998. Plaintiffs have not provided the court with any evidence to demonstrate that either X.L. or Primex knew or should have discovered through investigation that the plaintiffs had such a potential claim.

B. TIMELINESS OF THE REMOVAL

In an argument similar to the waiver claim, plaintiffs contend that the removal of this case was not timely. They argue that the provision in 9 U.S.C. § 205 which states "at any time before trial" means any time "before the resolution of any substantive issues of law or fact by the state court or even the argument of such issues". As authority plaintiffs cite several federal decisions.[16] The

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[14] Although plaintiffs claim that Georgia Gulf must file a separate cross-claim or third party demand for there to be a legitimate dispute of coverage, the court finds that action unnecessary and contradictory to the intent of the Convention and its implementing acts.

[15] *Steptore v. Masco Construction Company, Inc.* 643 So. 2d 1213 (La. 1994).

[16] *Pan Atlantic Group Inc. v. Republic Insurance Co.*, 878 F. Supp. 630(S.D.N.Y. 1995)) *Alley v. Nott*, 111 U.S. 472, 475-76, 4 S. Ct. 495, 496-97, 28 L. Ed. 491 (1884) (after argument on demurrer on the ground that no cause of action has been stated). *Sun Sails Corp. v. Block Land, Inc.*, 316 F.

plaintiffs assert that the "most important example" of the state court addressing the merits issue is when the plaintiffs amended their pleadings to allege intentional torts. In addition, they reference numerous exceptions and a motion to exclude expert testimony by Master Maintenance as having been allegedly briefed and argued before the state court.

This court does not agree with plaintiffs' interpretation of the phrase "at any time before trial". Most of the case law upon which plaintiffs rely was decided before the turn of the century, and those cases arise under the original 1875 removal statute. Only one case pertains to removal under the Convention, *Pan Atlantic Group, Inc. v. Republic Ins. Co.*, 878 F. Supp. 630 (S.D.N.Y. 1995). This court finds the reasoning of the *Pan Atlantic* court unsound because that court applied the rule of narrowly construing removal statutes which clearly should not apply to removal under the Convention.[17] While such a narrow approach is mandatory under the general removal statute, 28 U.S.C. § 1441, it does not apply to removal under the Convention. Quite the contrary, according to *McDermott, supra,* 9 U.S.C. § 205 should be construed broadly and in favor of the right of foreign parties to remove.[18]

This court is persuaded that the phrase, "any

Supp. 379 (E.D. Pa. 1970); *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir. 1989) and *Scharff v. Levy*, 112 U.S. 711, 5 S. Ct. 360, 28 L. Ed. 825(1884).

[17] *Pan Atlantic Group, Inc.*, 878 F. Supp. at 637.

[18] *McDermott International, Inc.*, 944 F.2d at 1213.

time before trial", as used in 9 U.S.C. § 205, means that removal may occur at any time before an adjudication on the merits.[19] The plaintiffs have cited no ruling in the state court which has resulted in a final determination of the plaintiffs' claims. The act of amending the petition and the other petitions was not dispositive of the suit nor did it result in an adjudication on the merits. For this reason, the plaintiffs' argument regarding the timeliness of the defendants' removal is not persuasive.

C. SUBJECT MATTER OF CASE RELATES TO AN ARBITRATION AGREEMENT

Plaintiffs' next argument challenges whether the insurers have a right under 9 U.S.C. § 205 to remove "the entire action" to federal court. They claim that under 9 U.S.C. § 205, their state court action does not "relate to" an arbitration agreement under the Convention. The phrase "relate to", according to plaintiffs, requires the parties in a state court action to be signatories to the arbitration agreement in dispute. Plaintiffs contend that their claims against X.L. and Primex only arise under the Louisiana Direct Action Statute, and not under any provisions of the contract.[20]

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[19] *See Beighley v. FDIC*, 868 F.2d 776, 782 (5th Cir. 1989) (the right of removal is not lost by actions in state court short of proceeding to an adjudication on the merits.)

[20] Plaintiffs also claim that the McCarran-Ferguson Act "preserves state statutes such as Direct Action Statutes, excepting them from the usual rules of preemption". The plaintiffs argument is misplaced. While the McCarran-Ferguson Act prohibits preemption of a state's insurance regulation, a dispute between an insurer and its insured

In support of their argument, plaintiffs rely upon the case of *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315 (5th Cir. 1997) vacated on other grounds, 145 F.3d 211 (5th Cir. 1998).[21] Although *Marathon* was vacated on other grounds, this court considers the decision as persuasive and useful in its determination of when a state court action "relates to" an arbitration agreement under the Convention.

In *Marathon*, Marathon Oil Company, Marathon Petroleum Norge, a subsidiary of Marathon Oil, and Marathon International Oil, an international affiliate of Marathon Oil, sued Ruhrgas, A.G., a German Gas supplier, for several business tort claims. The basis of plaintiffs' claim was that the defendant fraudulently induced them to invest in Marathon Petroleum Norway (MPN), a Marathon Oil subsidiary. MPN, although not a party to the suit, was subjected to a binding arbitration agreement with the defendant in Europe. Because of this arbitration agreement, Ruhrgas removed

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regarding terms of their contract is not "the business of insurance". *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 230, 99 S. Ct. 1067, 1082, 59 L. Ed. 2d 261 (1978).

[21] Plaintiffs also cite *In the Matter of Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989) and *Zimmerman v. International Companies and Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997). These cases, however, are irrelevant to the issue before this court. Neither of these cases deal with whether this court has jurisdiction or a right of a defendant to remove under the Convention. Both of these cases are Federal Arbitration Act Cases which stand for the proposition that a direct action plaintiff can not be compelled to arbitrate his direct action claim against the insurance company when he is a non-signatory to the arbitration agreement.

the entire action to federal court claiming that the subject matter of that suit related to an arbitration agreement under the Convention. The court, after considering various factors, held that the arbitration agreement was not relevant to the plaintiffs' action and remanded the case to state court.

Despite plaintiffs' contention in this case, *Marathon* does not stand for the proposition that courts should uniformly deny jurisdiction to all parties who are not signatories to an arbitration agreement. Instead, the *Marathon* court considered a number of factors in determining whether the subject matter of a state action is related to the arbitration agreement.[22]

In the unpublished opinion of *Ieyoub v. The American Tobacco Co.,* No. 97-1174 (JTT) W.D. La. Sept 11, 1997, Judge Trimble furnishes a convincing analysis of the *Marathon* case and the factors which it considered in its holding.[23] The factors described are:

> "(1) whether the plaintiffs themselves were signatories to the arbitration agreement; (2) whether the plaintiffs

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[22] *Marathon Oil Co.*, 115 F.3d at 321.

[23] In *Ieyoub*, the Attorney General of the State of Louisiana Richard Ieyoub filed suit against numerous tobacco manufactures, tobacco distributors, and their associates seeking to recover costs incurred by the state for pro-viding health care to individuals with tobacco-related illnesses. When the Attorney General sought to amend his petition to include over a hundred insurance companies under Louisiana's Direct Action Statute, the defendant-insurers, who were part of the Institute of Lloyd's of London, sought removal under the Convention.

> were seeking damages under the contract containing the allegedly relevant arbitration agreement; (3) whether there was any contractual relationship at all between the plaintiffs and the defendant; and (4) whether the plaintiffs were seeking redress for wrongs done to a signatory of the agreement".[24]

The plaintiffs in this case, like the plaintiffs in *Ieyoub*, are not signatories to the agreement, and they are not seeking redress for a wrong done to a signatory of the agreement. However, the plaintiffs are seeking damages directly from the insurers under contracts issued to their insured, the alleged tortfeasor. Furthermore, Louisiana's Direct Action Statute is construed as creating a contractual relationship which inures to the benefit of any and every person who might be injured by the insured.[25] Without the insurance contracts, plaintiffs have no claim against either of the insurers, and the dispute to be arbitrated directly impacts their possible recovery from those insurers. When these facts are considered together with the Fifth Circuit's holding that 9 U.S.C. § 205 was intended by Congress "to channel [ ] Convention Act cases into federal courts", this court has no hesitation in concluding that plaintiffs' state action is "related to" an arbitrable dispute under the Convention, and that removal of the entire action was proper.[26]

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[24] *Ieyoub*, at 7

[25] *Shockley v. Sallows*, 615 F.2d 233, 238 (5th Cir.) cert. denied, 101 S. Ct. 113 (1980).

[26] *McDermott Int'l Inc.*, 944 F.2d at 1208.

D. CONSENT BY ALL DEFENDANTS

Plaintiffs' last argument is that this case should be remanded because not all defendants have consented to removal. More specifically, they argue that in every case removed by the defendants at least one of the following parties have been named: Louisiana Intrastate Gas Company, L.L.C.; LIG Chemical Company; Equitable Resources, Inc.; and Associated Electric Gas Insurance Services, Ltd. (collectively the "LIG defendants"). The plaintiffs contend that when the defendants approached the LIG defendants and requested consent to removal, the LIG defendants' refused. According to the plaintiffs, when the LIG defendants refused to sign the consent to removal, the defendants/insurers altered the notice of removal so as to indicate that the LIG defendants have settled. Plaintiffs suggest that the only agreement made between themselves and the LIG defendants was as to the gross amount to be paid. It is the contention of plaintiffs that there were no specific allocations made to the individual plaintiffs, and that plaintiffs have not signed off on the agreement. Therefore, plaintiffs assert that the LIG defendants have not officially settled and should not be considered as a nominal party for purposes of removal.

The defendants, however, contend that under 9 U.S.C. § 205 consent of all the defendants is not required. In the alternative, they argue that if this court does require consent of all defendants, the consent of the LIG defendants is not required because they are only nominal defendants. They claim that although the plaintiffs have not signed

the agreement to settle, the LIG defendants, for all practical purposes, are no longer a party to the suit. Therefore, their consent was not required. Lastly, they assert that if the LIG defendants are not deemed nominal defendants then the "no-position letter" by George D. Kappus, attorney for the LIG defendants, should be considered as consent.

1. Consent of all defendants

The dispute over whether consent of all defendants is required comes from the differing interpretation by the parties of the phrase in 9 U.S.C. § 205 which states: "the defendant or the defendants may . . . remove such action . . ." Plaintiffs argue that this wording should be given the same construction which is given to identical language found in 28 U.S.C. § 1441(a).[27] Under § 1441(a), the jurisprudence is clear that all defendants to an action must join in removal, even if the federal question at issue impacts only one of the defendants.

The defendants, however, suggest that since the statutes implementing the Convention were to be given a broad construction, defendants such as the LIG group, who are without a right to removal, are not required to consent. They charge that any

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[27] 28 U.S.C. 1441(a) Actions removable generally

a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

other interpretation of 9 U.S.C. § 205 would defeat the purpose of the Convention.

As stated above, 9 U.S.C. § 205 is not given the same strict construction as cases removed under 28 U.S.C. § 1441.[28] However, the Congress is presumed to have intended similar terms in its legislation to have similar meaning.[29] The wording in 9 U.S.C. § 205 and the wording in 28 U.S.C. 1441 are identical in that both allow removal by "the defendant or defendants". Plaintiffs' argument is certainly plausible.

The Fifth Circuit had occasion to consider the Foreign Sovereign Immunities Act ("FSIA") in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1985). Pursuant to the FSIA, 28 U.S.C. 1441(d) specifically grants the right of removal to federal court to "the foreign state". Considering the Congressional purposes of the Act, the court concluded that a foreign state has the right to remove any action in which it is a defendant regardless of lack of consent by any other party defendant.

Subsequently, in *McDermott*, the court recognized the similar purpose of the two acts. In both acts "Congress deliberately sought to channel cases . . . away from the state courts and into federal courts . . . for the purpose of assuring a unitary federal jurisprudence." That purpose is best served by construing § 205 in a fashion that allows a foreign insurer to remove a case arising

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[28] *McDermott International, Inc.*, 944 F.2d at 1213.

[29] *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 118 S. Ct. 927, 939, 140 L. Ed. 2d 1 (1998).

under the Convention Act without the consent of any other party defendant.

As this court has already observed, supra p.5, and as the discussion in *McDermott* makes plain, *944 F.2d at pp. 1211 and 1212,* the purpose of channeling all Convention Act cases into federal court is to insure development of a uniform body of federal law. It is self-evident that the courts of the fifty states of this Union are unlikely to develop a uniform body of federal law regarding international arbitration agreements.

The purpose of the Convention Act to foster international contracts is furthered by assuring a foreign business dealing with an American business, that without regard to which of the states where that business may be located, the foreign business will have access to that uniform body of federal law in the event of a dispute relating to an arbitration agreement.

When a foreign insurer issues a policy containing such a clause to an American business, it cannot predict what other party defendants it might be grouped with in future litigation. To condition the foreign insurer's access to the uniform body of federal law upon the whim of unknown and unknowable future party defendants is to completely thwart the very purposes of the Convention Act. Foreign businesses who understand that their access to federal courts can be denied by one local party defendant are likely to think carefully before contracting with an American business.

A construction of § 205 proposed by plaintiffs

which requires consent of all defendants would constitute an obstruction to the free flow of foreign trade, a consideration which is not involved in removals under the general removal statute. Since the purpose of the Convention Act is to encourage foreign trade, such a construction should not be adopted, despite the use by Congress of the magic words, removal "by the defendant or the defendants" in § 205.

Thus, this court concludes that the jurisprudence under 28 U.S.C. § 1441 (a) as to the meaning of "the defendant or defendants" has no application to that phrase as used in 9 U.S.C. § 205.

2. Nominal defendants

Assuming that the court's holding relative to the necessity for consent of all defendants is in error, the defendants assert that the LIG defendants should be considered as nominal defendants because of the previous settlement agreements.

The consent of a nominal defendant is not required for removal. The test set out by the Fifth Circuit for whether a defendant is a nominal defendant is "whether in the absence of the [defendant], the Court can enter a final judgment consistent with equity and good conscience which would not be in any way unfair or inequitable to the plaintiff".[30] Defendants who have settled are

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[30] *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen and Assistants' Local 349*, 427 F.2d 325, 327 (5th Cir. 1970).

nominal defendants whose consent to removal is unnecessary.[31]

Plaintiffs concede that they are attempting to or have attempted to settle with the LIG defendants. However, they argue that the settlement, at the time of removal, was unenforceable. They claim that under *Erdy v. American Honda Co.*, a prior opinion of this court, there must be an enforceable settlement agreement signed by the plaintiffs in order for the settling defendant to be viewed as a nominal defendant.[32] They argue that the Fifth Circuit, in *Vasquez v. Alto Bonito Gravel Paint Corp.*, 56 F.3d 689 (5th Cir. 1995), confirmed Erdy's requirement of an enforceable settlement agreement.

Plaintiffs analysis of both *Erdy* and *Vasquez*, however, is marred. This court in *Erdy* did not require that there be an enforceable settlement agreement. *Erdy* simply stated that "where [a] plaintiff by his voluntary act has definitely indicated an intention to discontinue the action as to the non-diverse defendant, [he] has indicated that he no longer desires to dictate the forum and the case then becomes removable".[33] The *Vasquez* court did in fact confirm this holding when it stated the test is "whether there has been a voluntary act of the plaintiff that effectively elimi-

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[31] *J.D. Bradley v. Maryland Casualty Co.*, 382 F.2d 415, 419 (8th Cir. 1967).

[32] 96 F.R.D. 593 (M.D. La. 1983), modified on other grounds, 558 F. Supp. 105 (M.D. La. 1983)

[33] 96 F.R.D. at 599.

nated the non-diverse defendant from the case".[34]

In this case, counsel for plaintiffs have signed a settlement letter. The letter states that the LIG defendants shall pay "$ 11 million to resolve all claims brought against the LIG entities and their insurer by both plaintiffs . . . and Georgia Gulf. This payment is to be placed in an interest bearing account to be used 'exclusively as a dollar-for-dollar settlement and/or judgment credit in favor of Georgia Gulf. . . the monies are to remain in escrow until the conclusion of the litigation. . .upon severance of LIG from the pending suits against Georgia Gulf, neither Georgia Gulf nor the plaintiffs will seek to include LIG on the verdict form at any trial of this litigation."[35] n35

Plaintiffs have also filed a joint motion in state court to sever the LIG defendants from this suit. In this agreement, the plaintiffs state that they "have reached an agreement in principle for settlement". They also state that they "will terminate the involvement of LIG group in all matters arising out of the chemical exposures that are the subject of this consolidated action".[36] In this case, plaintiffs are attempting to "have their cake and eat it,

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[34] *Vasquez*, 56 F.3d at 693; *See also, Martineau v. Arco Chemical Co.* 25 F. Supp. 2d 762 (S.D. Tex. 1998) (confirming consent was not required from a settling defendant when counsel for settling defendant had signed a settlement letter, informed the court of a settlement agreement in principle and agreed upon consummation of settlement).

[35] *See* Defendant Georgia Gulf's Opposition to Plaintiffs Motion to Remand, Exhibit "J".

[36] *See* Defendant Georgia Gulf's Opposition to Plaintiffs Motion to Remand, Exhibit "L"

too". They cannot argue that there is no settlement between the LIG defendants and themselves, and at the same time made no attempt to disavow or challenge the settlement. Without regard to whether plaintiffs have signed a formal settlement document in this case, they have agreed, through their attorneys, to a dollar amount and have moved to sever the LIG defendants from the case. Under the test set out above, these actions constitute "voluntary acts" by plaintiffs to "effectively eliminate" the LIG defendants from this case. For these reasons, this court considers the LIG defendants to be nominal defendants and thus not required to consent to the removal of this case.

E. SEVERANCE OF NON-COVERAGE ISSUES

Lastly, plaintiffs argue in the alternative that this court should severe all non-coverage state issues, and remand all such issues to state court. Plaintiffs urge that this court follow the decision of *Acme Brick Co. v. Agrupacion Expordatora De Maquinaria Ceramica.*[37] In *Acme Brick*, the plaintiffs brought an action against the defendant Agrupacion for breach of contract and against the defendant American Home for payment under a payment and performance bond. American Home then filed a cross claim against Agrupacion requesting indemnification under a separate indemnity agreement which provided that the parties would arbitrate their claims. Agrupacion then removed under the Convention Act and on the basis of federal question jurisdiction, 28 U.S.C. § 1441. After the court dismissed American Home's

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[37] 855 F. Supp. 163 (N.D. Tex. 1994)

indemnification claim without prejudice in favor of arbitration, it decided that there was no longer any federal question issue remaining. The court thus remanded the breach of contract claim to state court.[38]

This court disagrees with the analysis used in *Acme Brick*. In *Acme Brick*, the court required an independent basis of jurisdiction in order to maintain an action under the Convention.[39] However, under 9 U.S.C. § 203, federal courts clearly have original jurisdiction over the entirety of any action which falls under the Convention. As stated in the discussion, supra, this "entire action" "falls under the Convention". Thus, this court has jurisdiction over the entire case under 9 U.S.C. § 201 *et seq.*, including the alleged state law claims, and cannot severe those claims.[40]

CONCLUSION

Accordingly, for the reasons assigned, the motion to remand by the plaintiffs Kent Acosta, et al (doc. no. 3) is hereby **DENIED.**

Baton Rouge, Louisiana, March 2, 1999.

/s/
JOHN V. PARKER,
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

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38 *Id.*

39 *Id.*

40 *See Ieyoub* at p. 11-14.